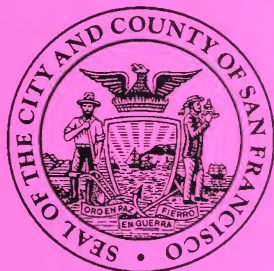




GOOD GOVERNMENT GUIDE

AN OVERVIEW OF THE LAWS GOVERNING
THE CONDUCT OF PUBLIC OFFICIALS



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TABLE OF CONTENTS

Table of Contents	i
Introduction.....	iii
 Part One: Serving on a Board or Commission	1
I. Creation of Boards and Commissions.....	1
II. Becoming a Commissioner	2
III. Leaving Office.....	4
IV. Compensation and Benefits	6
V. Ethical Obligations of Commissioners Upon Appointment.....	6
VI. The Roles of Commissions, Their Members and Their Staff.....	8
VII. Operations of Commissions	16
 Part Two: Conflicts of Interest, Financial Disclosure & Governmental Ethics Laws	19
I. Introduction.....	19
II. Conflicts of Interest & Financial Disclosure.....	20
III. Other Prohibitions.....	40
IV. Restrictions on Gifts, Honoraria, Travel & Loans.....	49
V. Obligations of City Officers and Employees	61
VI. Mass Mailings at Public Expense	62
VII. Penalties for Violations of Ethics Laws.....	65
 Part Three: Overview of Public Records & Public Meetings Laws	67
I. Introduction.....	67
II. Public Records and Information Laws	68
III. Records Retention and Destruction Laws.....	80
IV. Public Meeting Laws	84
V. Penalties and Enforcement	107
VI. San Francisco Charter Section 16.112: Required Notice For Certain City Actions	109
VII. The Citizens' Right-To-Know Act of 1998: Notice Before Approving City Projects.....	109
VIII. The Americans With Disabilities Act Notice Provisions.....	110
IX. The Application of Public Meetings and Public Records Laws to Private Entities	111
X. Conclusion	117
 Public Meetings Checklist.....	119
I. Notice of Meetings.....	119
II. Agendas.....	120
III. Audio or Video Recordings of Meetings.....	123

IV. Minutes	124
V. Disabled Access	125
VI. Reports	126
VII. Maintaining a Web Site	127
Public Records Request Checklist	129
I. Determine Timeline for Responding	129
II. Determine Whether Any Records Exist That are Responsive to the Request	130
III. Records Are Located	132
Public Records Request Form	135
Sample Gift Disclosure Form	137
Index.....	139

INTRODUCTION

“No man should have a political office because he wants a job. A public office is not a job. It is an opportunity to do something for the public. And once in office, it remains for him to prove that the opportunity was not wasted.”

— Franklin Knight Lane,
City Attorney of San Francisco, 1899-1900

I am pleased to present this updated Good Government Legal Guide for 2005.

This guide is intended to provide employees and officials of the City and County of San Francisco with a usable, accessible overview of the major laws governing their conduct as public servants—from public meetings and public records responsibilities to conflict-of-interest and personal financial reporting requirements. This guide updates and replaces our prior edition with a yellow cover, dated March 2004.

While my hope for this publication is that it will serve as a helpful reference for department personnel, commissioners, commission staff members and other public servants, it obviously cannot anticipate every situation or question that may arise. Neither can it anticipate the inevitable changes that are made to local, state and federal laws by policymakers and voters. So please be prudent: understand that no publication can substitute for the careful consideration of the application of various laws to specific conduct. For questions regarding a specific course of action you may pursue as a public official, I strongly encourage you to contact the deputy city attorney assigned to your department or commission. Otherwise, you may contact the Office of the City Attorney directly at (415) 554-4700.

Remember: a public office is a public trust. As public officials for the City and County of San Francisco, it is our highest responsibility to conduct the functions of government in a way that is honest, open and responsive to the citizens we serve. I am proud to offer my office's unwavering commitment to assist in that endeavor. And I hope you find this Good Government Guide helpful toward that end.

Sincerely,



DENNIS J. HERRERA
City Attorney of San Francisco



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PART ONE: SERVING ON A BOARD OR COMMISSION

In this portion of the Good Government Guide we provide general information about the role and duties of City boards and commissions. The specific provisions in the Charter relating to certain boards and commissions may differ from this general information. For more information related to specific boards and commissions, please see City Attorney Opinion No. 2004-01, available online at <http://www.sfgov.org/cityattorney/>. In addition, the Office of the City Attorney is always available to answer questions.

I. CREATION OF BOARDS AND COMMISSIONS

California law regulates cities unless voters in the city adopt a charter to govern their own municipal affairs. In a chartered city, the charter is the constitution and regulates and governs all aspects of city governance and administration. San Francisco voters have adopted a charter, most recently in 1995 (effective 1996). The voters have amended our current Charter numerous times over the past nine years. The San Francisco Charter creates most boards and commissions that exist in San Francisco government. The Board of Supervisors has also created a few boards and commissions by ordinance. In addition, San Francisco voters have created some boards and commissions by initiative ordinance.

The Board of Supervisors has also created many advisory committees, task forces and “working groups” by both ordinance and resolution. As described more fully in Part Three of this Guide, these groups are subject to the open meeting laws and many of the ethics and conflict of interest laws. While this portion of the Guide is specifically directed toward Charter boards and commissions, it provides guidance to these advisory bodies as well.

State and federal law also create some legally separate entities governed by a board or commission (e.g., San Francisco Unified School District, Community College District, Health Authority, Housing Authority, Redevelopment Agency, and Workforce Investment Board). These entities are not part of the municipal corporation, the City and County of San Francisco, but operate entirely within San Francisco and in many cases have intrinsic ties to the City. These entities carry out various state and federal functions at the local City and County level.

Finally, San Francisco participates in certain multi-county agencies created by State law or by agreement between public entities (e.g., Golden Gate Bridge Transit District and Transbay Joint Powers Agency).

II. BECOMING A COMMISSIONER

A. APPOINTMENT POWER AND PROCESS

The Mayor is responsible for the general administration and oversight of all departments and governmental units in the executive branch of the City and County. San Francisco Charter § 3.100. The Mayor appoints most commissioners under Charter section 3.100(17).¹ These Mayoral appointments are effective upon transmittal of a Notice of Appointment to the Clerk of the Board of Supervisors. The Notice of Appointment must include the appointee's qualifications to serve and a statement as to how the appointee represents the communities of interest, neighborhoods and diverse populations of the City and County. The Mayor's appointments remain in effect unless the Board of Supervisors rejects them by a two-thirds vote (eight members) within 30 days following the transmittal of the Notice of Appointment to the Clerk. (For more information on the appointment process, see City Attorney Opinion No. 2003-05.)

Certain other appointments by the Mayor are not effective unless and until they are approved by the Board of Supervisors (e.g., Mayoral appointments to the Board of Appeals, Entertainment Commission, Municipal Transportation Agency and Planning Commission). In those cases, the appointee may not exercise the powers of the office until the Board has approved the appointment and the appointee has taken the oath of office.²

¹ Entities or officers other than the Mayor appoint some members of commissions. See Charter §§ 4.105 [Mayor nominates four members, President of the Board nominates three members to the Planning Commission, all of whom are subject to Board approval]; 4.106 [Mayor nominates three members, President of the Board nominates two members to the Board of Appeals, all of whom are subject to Board approval]; 4.117 [Mayor nominates four members subject to Board approval and Board appoints three members of Entertainment Commission]; 4.121 [the Mayor appoints four members, the President of the Board of Supervisors appoints three members of Building Inspection Commission]; 4.123 [the Mayor appoints six members and each member of the Board of Supervisors appoints one member of the Youth Commission]; 4.134 [Mayor appoints four members and Board appoints three members to Small Business Commission]; 5.105 [the Fine Arts Museums Board of Trustees shall consist of 62 members to be elected by members of the Board]; 8.103 [Law Library Board of Trustees, consists of seven members of the San Francisco Bar and five *ex officio* members – the Mayor, Presiding Judge, and three judges of the Appellate Department of the Superior Court]; ; 8A.102 [Mayor appoints seven members, Board of Supervisors confirms members of the directors of the Municipal Transportation Agency after a public hearing]; 12.100 [the Mayor appoints three members, members of the Retirement System elect three members and a member of the Board of Supervisors chosen by the President of the Board serve on the Retirement Board]; 12.200 [the Mayor appoints two members, members of the Health Service System elect three members and a member of the Board of Supervisors and the City Attorney or a designated deputy serve as members of the Health Service Board]; 13.103.5 [Mayor, Board of Education, Board of Supervisors, City Attorney, District Attorney, Public Defender and Treasurer each appoint one member of the Elections Commission]; and 15.100 [Mayor, Assessor, Board of Supervisors, City Attorney and District Attorney each appoint one member to the Ethics Commission].

² If the appointed official is required to file a Statement of Economic Interest (see Section V.E.), the appointing authority must provide written notice to the Ethics Commission of the name of the appointee within 15 days of the appointee's assuming office. San Francisco Campaign and Government Conduct Code § 3.1-102.5(c) (hereafter "C&GC Code").

B. RESIDENCY AND OTHER REQUIREMENTS

In general, Charter section 4.101 governs residency and other requirements for appointees to City boards and commissions. Except where the Charter specifies otherwise, members of boards and commissions created by the Charter must be, and remain during their tenure, “electors.”³ An elector is defined as a person registered to vote in the City and County. This voter registration requirement encompasses other requirements: that members be of legal voting age, residents of the City and County, and United States citizens.

In the case of City boards and commissions created by ordinance, the appointing officer or entity may waive the residency requirement if a qualified local elector cannot be located. In addition, the ordinance may specify that members need not be of legal voting age or residents, but may not dispense with the citizenship requirement. Charter § 4.101(2).

Some City boards and commissions must include members who are selected from a specified profession, trade, union or business. The Ethics Commission may grant such appointees a waiver from certain conflict of interest laws (see Part Two, Section III, (B)(1)(c)). The California Political Reform Act provides some limited exceptions from the conflict of interest provisions for such appointees where the legislation creating the body contains certain findings (e.g., Charter § 4.133, Taxi Commission). 2 CCR § 18707.4.

Should a commissioner no longer meet the requirements of the office (for example the commissioner moves out of the City), the commissioner is no longer eligible to serve on the commission. The commissioner is deemed to have resigned from the commission by operation of law. A commissioner should notify his or her appointing authority immediately if any change in circumstances renders the commissioner ineligible to serve.

C. OATH OF OFFICE

In order to exercise the powers of the office, the appointee must take the oath of office prescribed by state law.

D. TERM AND TENURE

Under the Charter and applicable ordinances, the term of office for most appointees to City boards and commissions is four years. Charter section 18.114 provides that when a new board or commission is created or when new members are added to an existing board or commission, the members must be appointed to staggered terms.

³ The Charter exempts Youth Commissioners from being electors. Charter § 4.123.

Once a term expires the incumbent, if not replaced, may retain the office as a holdover commissioner, unless a specific provision of law provides otherwise.⁴ The incumbent is replaced by operation of law once the Mayor, or other appointing officer, appoints another candidate to the office. When the replacement candidate is appointed, he or she will serve the unexpired balance of the term.

It is important to distinguish between the term of an office and an individual commissioner's tenure in that office. The term of an office is generally a fixed period of time measured from a fixed anniversary date. For City boards and commissions, the term is generally measured as four years from the date a quorum of the entity was first sworn into office (unless the enabling legislation mandates a specific operative date). The term runs with the office, not with the individual occupant. As noted above, the term continues to run whether the seat is occupied or vacant. If, for example, a seat for an office with a four year term is left open for six months after the date the term expires, the term of the office is four years, but the next commissioner—if appointed six months after the prior term expired—will hold office only for the remaining three and one-half years of that term. The commissioner does not have a right to a full four years in office from the date of his or her appointment.

III. LEAVING OFFICE

A. REMOVING COMMISSIONERS

Many members of boards and commissions serve at “at will,” or can be removed at the pleasure of the Mayor or other appointing authority at any time and without cause.

Other commissioners may be removed only for cause. All “for-cause” commissioners must receive notice and an opportunity to be heard before they can be removed. Under Charter section 15.105, for-cause appointees may be removed for official misconduct.

“Official misconduct” is defined in Charter § 15.105(e):

Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

⁴ The tenure of the members of the Police Commission terminates upon expiration of their terms. Charter § 4.109.

Removal is mandatory upon conviction of a felony crime involving moral turpitude. Charter § 15.105(c).

Under § 15.105, the removal process begins with the Mayor suspending the officer.⁵ The Mayor must immediately notify the Ethics Commission and Board of Supervisors of the suspension in writing. The Mayor must present written charges against the officer to the Ethics Commission and Board of Supervisors at or before their next regularly scheduled meetings following such suspension. The Mayor must also immediately furnish a copy of the charges to the officer, who has the right to appear with counsel before the Ethics Commission in his or her defense. After the hearing, the Ethics Commission must make a recommendation to the Board of Supervisors as to whether the charges should be sustained. If, after reviewing the complete record, the Board of Supervisors sustains the charges by no less than a three-fourths vote of all eleven members (*i.e.*, nine votes), the suspended officer is removed from office. If the charges are not sustained, or not acted on by the Board of Supervisors within 30 days of receipt of the record from the Ethics Commission, the suspended officer is reinstated.

B. RECALL OF CERTAIN COMMISSIONERS

The voters may recall members of the Airport Commission, Ethics Commission, Port Commission or the Public Utilities Commission. Charter §§ 4.114, 14.103. No recall petition may be initiated for any officer who has held office for fewer than six months.

C. RESIGNATION PROCEDURE

Any member of a City board or commission may resign by presenting a written resignation to the Mayor or other body or officer that appointed the member. San Francisco Administrative Code § 16.89-15 (hereafter “Admin. Code.”)⁶ An oral statement of resignation is not sufficient. The resignation becomes effective at the time the appointing authority receives it, unless otherwise stated in the resignation. Admin. Code § 16.89-16. For example, a notice of resignation could state that the resignation will become effective on a specific date or once the appointing officer designates a new appointee. An offer of resignation, while indicating the office holder’s willingness to vacate the office, does not, by itself, constitute a resignation, even if in writing. Once a resignation is effective, it may not be rescinded.

⁵ For those commissioners appointed by an authority other than the Mayor, the appointing authority initiates the removal process. Charter § 15.105(b).

⁶ Within 15 days after an appointee leaves office, the appointing officer must provide written notice to the Ethics Commission of the name of the appointee leaving office. C&GC Code § 3.1-102.5(c).

IV. COMPENSATION AND BENEFITS

A. COMPENSATION

The Board of Supervisors sets compensation, if any, for each City board and commission, except where other Charter provisions or controlling law specify or bar compensation. Charter § A8.400.

B. HEALTH SERVICES BENEFITS

Charter sections 12.202 and A8.420 establish the City's Health Service System and provide that officers of the City and County, and other officers as provided by ordinance, are entitled to membership in the system. Administrative Code section 16.700 lists boards and commissions whose members are eligible to participate in the Health Service System.

V. ETHICAL OBLIGATIONS OF COMMISSIONERS UPON APPOINTMENT

A. COMMISSIONERS ARE OFFICERS OF THE CITY

Once a commissioner accepts an appointment, the commissioner becomes an officer of the City. An office is a public trust and all officers must exercise their duties in a manner consistent with this trust. Charter § 15.103. Commissioners owe a duty of loyalty to the City and must carry out their duties in a manner that serves the City's interests. (Please see Part Two for more information on the exercise of this public trust.)

Some commissioners are selected from a designated interest group. For example, appointments to the Taxi Commission must include a member of the senior or disabled communities, a driver who does not hold a taxicab medallion, a manager in a taxicab company, a member from the hospitality industry, a member from the labor community, a member from the neighborhoods, and a member of the general public. Charter § 4.133. Even commissioners who are selected from a particular interest group owe their duty of loyalty to the City. They do not represent the designated interest group. Thus, these commissioners, like all commissioners, must act in the City's interests.

B. ATTENDANCE

With one exception, the Charter does not set forth any specific attendance requirements for commissioners.⁷ Nonetheless, when accepting an appointment to a commission, a commis-

⁷ Charter section 4.123 sets forth attendance requirements for Youth Commissioners. Some commissions that have been created by ordinance or resolution contain attendance requirements in their enacting legislation.

sioner must swear to “well and faithfully discharge the duties” of her or his position. Attending meetings is a fundamental part of a commissioner’s duties. Repeated failure of for-cause commissioners to attend meetings could constitute official misconduct, which could lead to removal from the commission. Further, failing to attend meetings over a period of time could result in a finding that a commissioner has abandoned the position, causing the removal of the commissioner. Admin. Code § 16.89-17.

A commission may not adopt a rule providing for the removal of a member for failure to attend meetings. A commission may, however, adopt a rule requiring the commission to notify the appointing authority when a member misses a certain number of meetings over a specific period of time.

C. CONDUCT OF COMMISSIONERS

The Charter and Municipal Code do not specifically set forth a “code of conduct” for commissioners. As explained throughout this Guide, however, many state and City ethics and sunshine laws govern the actions of commissions and commissioners. As noted directly above, commissioners must comport themselves in a manner consistent with the public trust. Conduct that “falls below the standard of decency, good faith and right action impliedly required of all public officers” is considered official misconduct, which may result in removal from office. Charter § 15.105(e).

Some commissions choose to adopt a code of conduct for their members. Provided that the code of conduct is consistent with state and local laws, a commission is free to do so. Even without a code of conduct, commissioners are bound to act in a manner to uphold the public trust.

D. CONDUCT OF COMMISSIONERS WHEN ACTING IN A QUASI-JUDICIAL CAPACITY

When carrying out the functions the Charter and Municipal Codes assign to them, commissions may serve in different roles. Most commissions act as administrative or executive bodies. These commissions set policies for, approve actions of, and oversee departments. Other commissions act, solely or at times, in a “quasi-judicial” role. When acting as a quasi-judicial body, a commission adjudicates matters between private parties, or between the City and private parties or employees. Boards and commissions that most frequently act in a “quasi-judicial capacity” include the Board of Supervisors when hearing appeals from certain land use decisions, the Assessment Appeals Board, the Board of Appeals, the Civil Service Commission, the Entertainment Commission, the Ethics Commission, the Fire Commission, the Planning Commission, the Police Commission, the Rent Board, and the Taxi Commission.

Members of boards and commissions acting in a quasi-judicial capacity function like judges. Thus, they must take care to ensure that the parties appearing before them receive due process. Due process requires fair adjudicators. Commissioners must listen to the evidence before making decisions and base their decisions upon the evidence presented to them. Frequently, commissions that act in a quasi-judicial capacity adopt rules addressing the procedures for adjudicative hearings and the conduct of commissioners with regard to evidence and witnesses.

E. FINANCIAL DISCLOSURE FORM

Within 30 days of appointment, a commissioner must file a financial disclosure form with the Ethics Commission. The commissioner must thereafter file an annual financial disclosure form on or before April 1 of each year and within 30 days of leaving office. These forms are called “statements of economic interests,” and are also known as “SEIs” or “Form 700s.” The list of local appointed officials and employees who are required to file SEIs is set forth in San Francisco’s Conflict of Interest Code in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. These forms are public records available for anyone to review. (For more information on SEIs, see Part Two.)

F. ANNUAL SUNSHINE TRAINING

Each commissioner must file an annual declaration with the Ethics Commission stating that the commissioner has read the San Francisco Sunshine Ordinance and has attended, or will attend when next offered, a Sunshine Ordinance training session. The Ethics Commission provides a form for this purpose. The City Attorney’s Office, in cooperation with the Sunshine Ordinance Task Force, provides a live training once a year. In addition, the training is available in DVD or VHS formats and in video streaming on the City Attorney’s Web site.

VI. THE ROLES OF COMMISSIONS, THEIR MEMBERS AND THEIR STAFF

A. POWERS, DUTIES AND RESTRICTIONS RELATING TO COMMISSIONS

1. POWERS AND DUTIES

San Francisco Charter section 4.102 sets forth the powers and duties of City commissions within the executive branch. Section 4.102 provides that each board or commission shall:

1. Formulate, evaluate and approve goals, objectives, plans and programs and set policies consistent with the overall objectives of the City and County, as established by the Mayor and the Board of Supervisors through the adoption of City legislation;

2. Develop and keep current an Annual Statement of Purpose outlining its areas of jurisdiction, authorities, purpose and goals, subject to review and approval by the Mayor and the Board of Supervisors;
3. After public hearing, approve applicable departmental budgets or any budget modifications or fund transfers requiring the approval of the Board of Supervisors, subject to the Mayor's final authority to initiate, prepare and submit the annual proposed budget on behalf of the executive branch and the Board of Supervisors' authority under [Charter] Section 9.103;⁸
4. Recommend to the Mayor for submission to the Board of Supervisors rates, fees and similar charges with respect to appropriate items coming within their respective jurisdictions;
5. Unless the Charter provides a different procedure for appointing department heads, submit to the Mayor at least three qualified applicants, and if rejected, to make additional nominations in the same manner, for the position of department head, subject to appointment by the Mayor⁹;
6. Remove a department head; the Mayor may recommend removal of a department head to the commission, and it shall be the commission's duty to act on the Mayor's recommendation by removing or retaining the department head within 30 days; failure to act on the Mayor's recommendation shall constitute official misconduct;¹⁰
7. Conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry, and make recommendations to the Mayor or the Board of Supervisors;
8. Exercise such other powers and duties as shall be prescribed by the Board of Supervisors; and
9. Appoint an executive secretary to manage the affairs and operations of the board or commission.

To carry out its duties, a commission may hold hearings and take testimony. Charter § 4.102(10). In addition, relative solely to the affairs under its control, a commission may examine the department's documents, hold hearings, subpoena witnesses and compel production of documents. Charter § 16.114.

⁸ Each department is responsible for providing the Mayor and Board of Supervisors with a mission-driven budget that describes each proposed activity of the department and the cost of the activity. Charter § 9.114.

⁹ The Mayor may choose to appoint a department head who has been nominated by the board or commission, even though fewer than three nominations were submitted. The three-nominee process is intended to provide the Mayor a range of choices. If the Mayor does not object, the board or commission may submit fewer than three names. While the Mayor may indicate a preferred nominee before the board or commission submits its nominee(s), the board or commission is not legally obligated to honor the Mayor's preference. The Mayor may also decline to accept any of the commission's nominees and ask for further nominations. City Attorney Opinion No. 2004-01.

¹⁰ The Mayor may independently remove the Chief of Police. Charter § 4.109.

2. RESTRICTIONS ON COMMISSIONS

Along with giving powers to commissions, the Charter also restricts how a commission may deal with the administrative affairs of its department.

Each board or commission, relative to the affairs of its own department, shall deal with administrative matters solely through the department head or his or her designees, and any dictation, suggestion or interference herein prohibited on the part of any member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the board or commission's power of hearing or inquiry as provided in this Charter. Charter § 4.102.

This restriction, which originated in the 1932 Charter, establishes a chain of command that governs the operation of departments under commissions. The commission sets policy and communicates that policy to the department head, who in turn is responsible for its execution.¹¹ City Attorney Opinion 90-01, p. 2. As we stated in a 1990 Opinion:

[T]here is no prohibition...against a commission dictating administrative policy for its department, so long as the board or commission proceeds in the manner provided by the charter...[a] board or commission may act only at a noticed meeting attended by a quorum of the commission or its committees, and only by means of a vote of the commission or its committees. So long as a commission complies with these Charter requirements, it enjoys a broad authority to address administrative matters within its own department. *Id.* at p. 3.

The requirement that a commission deal with administrative matters solely through the department head does *not* apply to actions taken through the commission's power of hearing or inquiry. Charter § 4.102. "The commission's power of inquiry includes the authority to call any department officer or employee before the commission to answer questions regarding the operations of the department. But if the commission wants to make changes in departmental operations as a result of those inquiries, it must still address its directives to the department's chief executive officer." City Attorney Opinion 90-01, p. 4.

¹¹ See 1932 San Francisco Charter section 3.500(i).

B. THE ROLE OF AND RESTRICTIONS ON INDIVIDUAL COMMISSIONERS

The Charter reposes the power and duties of a commission in the commission as a whole, and not in individual members. Charter § 4.102. The Charter requires commissions to act at public meetings. Charter § 4.104; California Government Code § 54953 (hereafter “Govt. Code”). In addition, a quorum of the commission must be present for it to act. Charter § 4.104; see also Govt. Code § 54952.6 (defining “action taken” as a collective decision or commitment made by a majority of members of a commission). Thus, a commission exercises its power as a body. Individual members lack the authority to exercise powers of the commission as individuals, although commissions may designate individual commissioners to perform assigned duties, such as monitoring the progress of a departmental program and reporting information on the program to the commission.

In addition, as noted above, Charter section 4.102 imposes an additional restriction on individual commissioners. The section provides that “any dictation, suggestion or interference [in administrative affairs] herein prohibited on the part of any member of a board or commission shall constitute official misconduct . . .” Thus, in addition to requiring that a commission deal with administrative matters solely through the department head or his or her designees, section 4.102 prohibits *individual members* of boards and commissions from dictating, suggesting or interfering in administrative matters. City Attorney Opinion 90-01. The prohibition does not, however, prevent individual commissioners from seeking information from the department head about the department’s operations. Further, with the department head’s consent, commissioners may also seek information from department staff.

C. THE ROLE OF COMMISSION OFFICERS

Unless the commission rules or enacting legislation provide otherwise, neither the president nor vice-president of a commission has any greater authority than any other commissioners. As noted above, the Charter permits a commission to adopt rules and regulations consistent with the Charter and City ordinances. Charter § 4.104. Under this authority, most commissions adopt rules providing for the election of a president. The president presides over meetings and may call special meetings of the commission.

If the commission so chooses, it may give additional powers to the president in its rules or bylaws. Frequently, commission rules authorize the president and the department head to set the agenda for meetings. In addition, some commission rules authorize the president to create committees of the commission and assign members to those committees or act as a spokesperson for the commission.

D. THE ROLE OF A DEPARTMENT HEAD

The Charter also sets forth the responsibilities of the department head. Charter section 4.126 provides that the department head is responsible for the “administration and management of” her department. Department heads may:

1. Appoint qualified individuals to fill all positions within their departments that are exempt from the Civil Service provisions of this Charter;
2. Adopt rules and regulations governing matters within the jurisdiction of their respective departments, subject, if applicable, to Section 4.102; and
3. With the approval of the City Administrator, reorganize their respective departments. Ibid.

San Francisco Administrative Code section 2A.30 further specifies the roles and duties of the department head. Section 2A.30 provides, “[e]ach department head shall be immediately responsible for the administration of his or her department...[and] shall act as the ‘appointing officer’ under the civil service provisions of the Charter for the appointing, disciplining and removal of such officers, assistants and employees as may be authorized.”

Thus, the department head acts as the day-to-day manager of the department, subject to the direction of the commission and the Mayor. Department heads serve at the pleasure of the commission. Unless the Charter expressly provides otherwise, only the commission may remove the department head.¹² The Mayor may *request* that a commission remove its department head and the commission must act on that request within 30 days, but the commission must make the decision whether to remove the department head. Charter § 4.102(6). Unless the Charter or specific sections of the Municipal Code expressly provide otherwise, the department head is not required to seek commission approval before signing contracts and making other decisions on behalf of the department. Rather, the commission and department head determine which matters require commission approval.

E. THE ROLE OF COMMISSION SECRETARY

Subject to the budgetary and fiscal provisions of the Charter, each Charter commission may appoint a secretary to manage the affairs and operations of the commission. Charter § 4.102. Generally, a commission secretary is responsible for arranging commission meetings; preparing and distributing notices, agendas, minutes and resolutions of the commission; providing information to the public regarding the commission’s affairs; maintaining the commission’s files and records; and carrying out additional duties as directed by the commission.

¹² The Mayor or the Police Commission may remove the Chief of Police. Charter § 4.109. Following a probationary period, the Elections Commission may remove the Director of Elections only for cause. Charter § 13.104.

Usually, a commission secretary is appointed by and serves at the pleasure of the commission. The secretary's duty is to the commission, as whole, and not to individual commissioners. Accordingly, a commissioner should not ask the commission's secretary for individual reports, favors or special considerations. If a commissioner wants information that will require a significant amount of the staff time, the commissioner should bring the request to the commission to determine whether the secretary (or other staff) should pursue the task.

F. ROLE OF THE CITY ATTORNEY

The City Attorney is the legal counsel for the City. In that capacity, the Office of the City Attorney represents the City and its officers and employees in lawsuits; drafts and approves legislation and contracts; and provides legal advice to the City and its commissions, officers and employees. Charter § 6.102.

1. THE CITY IS THE CLIENT OF THE CITY ATTORNEY'S OFFICE

The City as a whole is the client of the City Attorney.¹³ While the City can act only through individual officers and employees or constituent bodies, such as boards and commissions, those City actors are not separate clients of the City Attorney's Office. Accordingly, the Office does not have a conflict of interest in advising multiple City officers and departments, who often may have differing policy views about issues giving rise to the need for legal advice. The Office does not owe a distinct duty of loyalty to individual officers or entities who act on the City's behalf.

This legal principle stems from two authorities: San Francisco's Charter and the California Rules of Professional Conduct. Charter section 6.102 designates the elected City Attorney as the legal representative of the City as a whole. The purpose of creating an elected City Attorney was to ensure that the City Attorney would owe his or her loyalty to the people of San Francisco. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." Francis V. Keesling, *San Francisco Charter of 1931*, at p. 41 (1933). In addition, a single City Attorney allows the City to speak with one voice on legal issues and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.

The California Rules of Professional Conduct also provide that the City as a whole is the client of the City Attorney. The Rules specify that when representing any organizational client, whether a corporation or a municipality, a lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing the

¹³ For more information, see the memorandum entitled, "Client of the City Attorney" (December 12, 2003) on the City Attorney's Web site.

particular issue. Rule 3-600(A), Cal. Rules of Prof. Cond.; *see also* Rule 1.13, ABA Model Rules of Prof. Cond.

Because the City is the client of the City Attorney, the City Attorney generally does not have a conflict in representing multiple persons and entities. Thus, for example, the State Bar has explained that a City Attorney, asked to advise both a Mayor and a City council regarding the power to adopt an ordinance where the two City actors disagreed on the legality and appropriateness of the action, does not have a conflict of interest and may advise both the Mayor and the City council. Both have a role, at different times, in speaking for the City on the legislation, and neither may sue the other over the dispute. *See* Cal. State Bar Ethics Op. 2001-156.

There are two limited exceptions to this general rule. The City Attorney sometimes represents separate legal entities that are related to but not part of the City. In addition, the City Attorney sometimes represents officers and employees in their individual capacities in tort lawsuits against them and the City in other legal matters. In these two limited circumstances, a different analysis applies to the City Attorney's role.

While the City is the client of the City Attorney, it does not follow that the City Attorney shares with every member of the organization the information discussed with a single commission, officer, or employee. Generally, when an individual City actor requests advice and asks that the request not be shared with others, the practice of the City Attorney's Office is, as a matter of comity, to honor that request to the extent possible. This practice allows each City actor to freely obtain the legal advice the City actor needs to perform his or her organizational function, without concern that the discussions will be shared with someone with whom they have a policy disagreement.

But this practice does not entitle the officer to have the City Attorney withhold that same advice from the entities that speak for the City on a particular matter. To the contrary, one of the roles of the City Attorney's Office is to provide consistent, objective legal advice to all affected policy makers so that decisions can be made on the basis of informed policy choices, rather than the outcomes of legal disputes. For example, if two officers ask for confidential legal advice on the same question, the City Attorney will provide the same legal advice to each of them. The City Attorney may share advice with multiple City officials in other circumstances as well. For example, if a single member of the Board of Supervisors requests draft legislation that the Office considers likely to be invalid, the Office will advise the member about the legal problems, but will also provide the same advice to legislative committees that consider the legislation, and to the full Board of Supervisors if the legislation comes before it, and then, finally, to the Mayor if the Board approves the legislation.

Finally, on occasion the City Attorney will assign one team of lawyers to a City board or commission that is engaged in adjudicating a matter, such as an appeal of a permit or tax assessment, and a separate team of lawyers to the department that made the underlying decisions. The two teams of attorneys do not share information about the pending case. In such a case, the City is still the client and the City Attorney's office does not have a conflict in advising both entities. But in order to protect the due process interests of persons appearing before the adjudicating board or commission, separate lawyers are assigned to advise that body and the City party involved in the matter.

2. THE CITY ATTORNEY'S ROLE IN PROVIDING ETHICS AND OPEN GOVERNMENT ADVICE

These observations are particularly relevant with respect to advice provided to public officials about the ethics and open meeting laws discussed in the other sections of this Good Government Legal Guide. When City officers and employees seek advice on ethics laws or open meeting laws, the City Attorney's Office does not provide that advice to the officer or employee in his or her individual capacity, but as a City actor performing City duties. The individual City officer or employee does not have a separate attorney-client relationship with the City Attorney's Office.

While the City Attorney's Office does not disseminate the information a person provides when seeking assistance in complying with these laws, the Office may share that information with other City officials who require that information to perform their functions. For example, if a member of a commission is advised not to participate in the commission's discussion on a contract because of a conflict of interest, but proceeds to do so anyway, the City Attorney's Office will advise the full commission that the individual commissioner has a conflict of interest. The commission requires this information because the conflict of interest could invalidate the commission's actions on the contract.

Finally, City officers and employees should be aware that legal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a request for records under the Sunshine Ordinance. Accordingly, the practice of the City Attorney's Office is to make clear to any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

VII. OPERATIONS OF COMMISSIONS

A. GOVERNING LAW

The Charter sets forth the general powers and duties of City commissions in sections 4.102 – 4.104. In addition, the Charter may set forth more specific powers and duties for each commission. Finally, the Municipal Code sets forth additional duties for some commissions. This section summarizes the general powers and operations of commissions.

In addition to the local laws that govern City commissions, some state laws affect their operations. As described in Part Three, state public meeting and public records laws, along with their local counterparts, apply to the operations of City commissions.

B. COMMISSION RULES OF ORDER OR BYLAWS

In addition to the local laws described above, a commission may adopt rules and regulations consistent with state and local law. Charter § 4.104(1). Any amendment to these rules requires a public hearing, for which the commission must give at least ten days notice. A copy of the rules must be filed with the Clerk of the Board of Supervisors and the Library. *Ibid*.

A commission's rules of order or by-laws address matters relating to the operation of the commission that are not addressed by the Charter, Municipal Code or state or local sunshine laws. Generally, the rules address issues such as the election, terms and duties of officers; the establishment of the regular meeting time and place of the commission; the procedure for setting agendas; the procedure for consent calendars (if any); and procedures relating to the establishment and appointment of committees of the commission. The bylaws of many commissions provide that Roberts Rules of Order govern the commissions' operations where the bylaws do not address a matter. Just as a commission may not adopt any rule that is inconsistent with state or local law, it may not rely on a provision of Roberts Rules that is inconsistent with those laws.

C. QUORUM

Generally, under the Charter, a majority of the members of a board or commission constitutes a quorum for the transaction of business. The majority must consist of a majority of the number of members designated by law, rather than the number of seats actually filled. Charter § 4.104.

When a quorum of a body fails to attend a scheduled meeting or the body loses a quorum because of the departure of some of its members, the only official actions that the body may take are to: (1) fix the time to which to adjourn; (2) adjourn the meeting; (3) recess the

meeting; or (4) take measures to secure a quorum. See generally Govt. Code §§ 54955 and 54955.1. Any other action taken by the body is null and void.

Once a meeting ceases, members of the board or commission may remain to discuss any matter they choose with the members of the public who have attended. In the event that documents are collected, notes taken or a recording made, they may be presented at the next meeting of the board or commission so that they may become part of its record.

If there is a lack of a quorum at a meeting of a legislative body that has committees, the parent board or commission may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee happens to be present. Such a committee meeting would require a separate notice and posting of agenda.

D. VOTING

Commissions may not vote by secret ballots. All votes, other than those permitted in a closed session, must be taken publicly. An absent member may not vote by proxy. Charter §§ 2.108, 4.104(3); Govt. Code § 54953(c); Admin. Code § 67.26.

With two exceptions, the Charter requires members of commissions and boards to vote on every matter before them. As noted elsewhere in this Guide, a member may not vote on a matter where the member's vote would violate a conflict of interest law. In addition, a member may be excused for any reason from voting on a matter by a motion adopted by a majority of members present. Charter § 4.104; Admin. Code § 1.29.

When determining whether an action is approved, the required number of votes needed is based on the total number of seats, rather than the number of seats currently filled, the number of members present or the number of members qualified to vote on the item. Charter § 4.104.

E. ELECTION OF OFFICERS

As described above, commissions generally adopt rules establishing officers and terms for the officers. Some commissions establish in their bylaws or rules a particular method for electing officers. Commissions that have established a procedure should follow that procedure. The vote for commission officers, like all votes, must occur publicly.

Where a commission has not adopted a specific process for electing officers, it may look to Roberts Rules of Order for guidance. Roberts Rules provides several methods for electing officers. City commissions frequently use the following process: the presiding officer takes public comment on the agenda item. Then the presiding officer requests nominations for the office from the members of the commission. No second is required under Roberts Rules of

Order. When no additional nominations are offered, the presiding officer closes the nominations. The commission then votes on the nominations in the order they were received. The first candidate to receive a majority of the votes is elected to the office.

PART TWO: CONFLICTS OF INTEREST, FINANCIAL DISCLOSURE & GOVERNMENTAL ETHICS LAWS

I. INTRODUCTION

City officers and employees are subject to strict conflict of interest laws. State laws, particularly the Political Reform Act, Government Code section 87100, et seq., impose broad conflict of interest rules, gift limits, and financial disclosure requirements. The City and County of San Francisco imposes additional conflict of interest rules and gift limits.

This guide describes the State and local conflict laws that govern the conduct of public officials. This guide supercedes previous guides on the laws governing the conduct of public officials in San Francisco.

A. A PUBLIC OFFICE IS A PUBLIC TRUST

Charter section 15.103 provides that “Public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust.” This provision expresses the underlying purpose of the conflicts laws. Section 15.103 does not itself impose an enforceable duty, but rather authorizes the enactment of laws to implement this fundamental obligation of public service by providing:

The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal authorized in [the] Charter. All officers and employees of the City and County shall be subject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

The City’s ethics provisions, adopted under this section, are found in the Campaign and Governmental Conduct Code, sections 3.200 through 3.244. The findings and purpose section, section 3.200, states that in order to ensure that the governmental processes promote fairness and equity for all residents and to maintain public trust in governmental institutions, the people of San Francisco declare that they have a compelling interest in creating laws regulating conflicts of interest and the outside activities of City officers and employees. Section 3.202 provides that the City’s ethics laws are to be liberally construed to effectuate their purposes.

B. THE SAN FRANCISCO ETHICS COMMISSION

San Francisco's Ethics Commission is responsible for the implementation and administration of local laws relating to political campaigns, lobbying, conflicts of interest, and governmental ethics. The Commission provides advice and assistance to City officers, candidates for City office, and City employees regarding compliance with local governmental ethics laws.

The Ethics Commission also investigates complaints regarding the conduct of City officers and employees. The Ethics Commission's investigations are confidential to the extent permitted by State law. In addition, local law protects individuals who file complaints with the Ethics Commission from retaliation for filing complaints.

The Ethics Commission is located at 30 Van Ness Street, Suite 3900, San Francisco, CA 94102. Copies of San Francisco's ethics laws, Ethics Commission implementing regulations, and advice letters, as well as information about the complaint process, are available on the Commission's Web site: <http://www.sfgov.org/ethics>.

II. CONFLICTS OF INTEREST & FINANCIAL DISCLOSURE

Several State and local laws prohibit City officials from participating in decisions in which they have a financial interest. In most cases, these laws provide that conflicts may be avoided if the official discloses his or her interest and abstains from participating in or seeking to influence a decision in which the official has a financial interest. But in some cases, the official must choose between maintaining the financial interest and continuing to serve as a public official.

This section addresses laws on conflicts of interest and financial disclosure. Subsection A discusses the California Political Reform Act's prohibition on conflicts of interest, which is the principal State law governing conflicts. Subsection B addresses the Act's financial disclosure requirements, which are designed to prevent conflicts. Subsection C addresses the Act's prohibition on conflicts arising from the solicitation or receipt of campaign contributions by certain appointed members of boards and commissions. Subsections D through G address other State and local conflict of interest provisions.

A. CONFLICTS OF INTEREST: THE POLITICAL REFORM ACT

California's Political Reform Act (the "Act") prohibits public officials from making, participating in making, or seeking to influence governmental decisions in which they have a financial interest. Govt. Code § 87100. Under the Act, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, different from the effect on the public generally, on the public official's economic interests. Govt. Code § 87103.

When a public official has a conflict under the Political Reform Act, the official must abstain from participating in the decision. The official is not counted for purposes of establishing a quorum. In addition, a public official cannot attend a closed session or obtain or review a recording or any non-public information regarding the governmental decision in which he or she has a prohibited conflict of interest.

Some public officials are subject to additional requirements when they have a conflict of interest. When members of the Board of Supervisors, members of the Planning Commission, members of the Retirement Board, the Mayor, the City Attorney, the District Attorney, the City Treasurer and all City officials who manage public investments, have a conflict of interest under the Act they must announce their financial interest on the public record and leave the room while the matter is being discussed and decided. Govt. Code § 87105; 2 CCR § 18702.5.

The California Fair Political Practices Commission ("FPPC"), which administers and enforces the Act, has developed an 8-question framework for assessing whether an officer or employee has a conflict of interest under the Act. In analyzing any conflict of interest question under the Act, you should proceed through the following 8-step analysis. 2 CCR § 18700.

-
- 1 No **public official** shall make, participate in making or in any way attempt to influence
 - 2 a **government decision** in which he or she has a **financial interest** different from the interest of the
 - 7 **public generally.**
 - 8 **Legally required?**
 - 3 **economic**
 - 4 **direct or indirect**
 - 5 **substantial**
 - 6 **material**
 - 6 **foreseeable**

1. IS THE INDIVIDUAL A PUBLIC OFFICIAL?

The Act defines the term public official as a "member, officer, employee, or consultant" of a local government agency. The term "member" includes any member of a board or

commission with decision making authority and in limited circumstances could include a member of a nonprofit corporation. Whether a “consultant” qualifies as a public official depends upon the nature and extent of the consultant’s work. Govt. Code §§ 82048; 82019; 2 CCR § 18701.

If the individual is not a public official, then the Act does not apply.

2. IS A GOVERNMENT DECISION INVOLVED?

The Act prohibits a public official from making, participating in making, or seeking to influence a government decision in which the official has a financial interest. The Act specifically defines these activities as follows:

Making a decision. A public official makes a decision when he or she:

- votes;
- appoints a person to a position;
- obligates his or her agency to a course of action; or
- enters into a contract for the agency.

Deciding not to act, unless based on disqualification under the Political Reform Act, also constitutes making a decision. 2 CCR § 18702.1.

Participating in making a decision. Participating in making a decision includes negotiating, providing advice by way of research, investigation, or preparation of reports or analyses for the decision-maker, if these functions are performed without significant intervening substantive review.

Participating in making a decision does not include ministerial or clerical actions, appearing before an agency to represent the official’s personal interests, or actions by a public official with regard to his or her compensation for services or the terms or conditions of his or her employment or contract. 2 CCR § 18702.2.

Influencing a decision. Influencing a decision includes contacting, appearing before, or otherwise attempting to influence any member, officer, employee or consultant of the official’s agency, or an agency appointed by or subject to the budgetary control of the official’s agency. Influencing a decision before another agency that is not subject to the control of the public official’s agency, includes acting on behalf of, or as a representative of, the public official’s agency in contacts with the other agency. Acting as a representative of the official’s agency includes, for example, using official stationery. 2 CCR § 18702.3.

If no government decision is involved, the Act does not apply.

3. IS AN ECONOMIC INTEREST INVOLVED?

The Act prohibits involvement in a government decision only if the decision involves one of the following economic interests identified in the Act:

Investments. A direct or indirect investment worth \$2,000 or more in any business entity doing business in the jurisdiction. An indirect investment means an investment owned by the spouse, dependent child, or agent of the public official, or by a business entity or trust in which the official (or the official's spouse, registered domestic partner recognized by State law, dependent child, or agent) owns a 10% or greater interest. Govt. Code § 82034; 2 CCR § 18703.1.

What is “doing business in the jurisdiction?” An entity is doing business in the jurisdiction if it has contacts on a regular or substantial basis with a person who maintains a physical presence in the City and County of San Francisco. Contacts include manufacturing, distributing, selling, purchasing or providing goods or services. If an official wishes to claim that a business is not doing business in the jurisdiction, the public official bears the burden of demonstrating this fact. 2 CCR § 18230.

Real Property. A direct or indirect interest worth \$2000 or more in any real property in the jurisdiction. An indirect investment means an investment owned by the spouse, dependent child, or agent of the public official, or by a business entity or trust in which the official (or the official's spouse, registered domestic partner recognized by State law, dependent child, or agent) owns a 10% or greater interest. 2 CCR § 18703.2.

Source of income or gifts. Any source of income (other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status) aggregating \$500 or more in value, or any source of gifts with a cumulative value of \$360 or more, provided to, received by, or promised to the public official within 12 months prior to the time the decision is made. Govt. Code § 82030; 2 CCR § 18703.2.

Business positions. Any business entity doing business in the jurisdiction in which the public official is a director, officer, partner, trustee, employee or holds any position of management. 2 CCR § 18703.1(b).

Income, assets, or expenses. The income, assets, and expenses of the public official or the public official's immediate family. “Immediate family” means spouse, registered domestic partner recognized by State law, or dependent children. 2 CCR § 18703.1(b).

If none of these enumerated economic interests are involved, the Act does not apply.

4. DOES THE DECISION DIRECTLY OR INDIRECTLY INVOLVE THE PUBLIC OFFICIAL'S ECONOMIC INTEREST?

Direct involvement. A decision directly involves a public official's economic interest if the economic interest is the subject of the decision. For example, if a company in which an official has an interest of \$2,000 or more is seeking a contract with the official's department, the official has a direct interest in decisions about the contract. 2 CCR §§ 18704.1; 18704.2 and 18704.5.

Indirect involvement. Any time a public official's economic interest is affected by a decision, but that economic interest is not the subject of the decision, the interest is said to be "indirectly" involved in the decision. For example, a vote on general legislation that affects the public official's economic interest as well as the interests of many other City residents or businesses is a type of government decision that would indirectly affect a public official's economic interests. See *ibid*.

5. WHAT MATERIALITY STANDARD APPLIES?

Under the Act, a conflict exists only if the effect of a decision on the official's economic interests will be "material." Determining materiality usually requires estimating the dollar value of the effect of a decision on the official's economic interest. The FPPC regulations set forth specific standards for determining when a decision's effect on a particular type of economic interest is material. Application of those standards will turn in part on whether the official's economic interest is directly or indirectly involved in the decision.

a. A. DECISIONS INVOLVING AN ECONOMIC INTEREST IN A BUSINESS ENTITY

i. DIRECTLY INVOLVED

The effect of a decision on a business entity which is directly involved in a governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that a governmental decision will have any financial effect on the business entity.

SPECIAL RULE FOR FORTUNE 500 COMPANIES AND COMPANIES LISTED ON THE NEW YORK STOCK EXCHANGE ("NYSE") OR THAT MEET THE CRITERIA FOR LISTING ON THE NYSE. For Fortune 500 business entities, business entities listed on the NYSE, or if not listed on the NYSE that had before tax earnings in the prior fiscal year of \$2.5 million or more (or such other amount described in the minimum standards for initial listing on the NYSE), if the public official has an investment of \$25,000 or less, the decision's effect is material only if the standards for "indirectly involved" business entities are met. Those standards are set forth in the next subsection.

ii. **INDIRECTLY INVOLVED**

The effect of a decision is material for any business entity in which an official has an economic interest if the following standards (which vary with the size of the business) are met:

Fortune 500. For a Fortune 500 business entity, the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$10,000,000 or more; or
- incurring or avoiding expenses for a fiscal year of \$2,500,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$10,000,000 or more. 2 CCR § 187045.1(c)(1).

New York Stock Exchange. For a business entity listed on the NYSE or if not listed on the NYSE that had before tax earnings in the prior fiscal year of \$2.5 million or more (or such other amount described in the minimum standards for initial listing on the NYSE), the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$500,000 or more; or
- incurring or avoiding expenses for a fiscal year of \$200,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$500,000 or more. 2 CCR § 187045.1(c)(2).

NASDAQ/American Stock Exchange. For a business entity listed on the NASDAQ or American Stock Exchange, or if not listed, that had before tax earnings of \$500,000 or more (or such other amount described in the minimum standards for continued listing on the NASDAQ SmallCap market), or before tax earnings of \$750,000 or more (or such other amount described under initial listing standard 1 of the Rules of the American Stock Exchange), the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$300,000 or more; or
- incurring or avoiding expenses for a fiscal year of \$100,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$300,000 or more. 2 CCR § 18705.1(c)(3)

All Others. For any business entity that does not meet any of the above standards, it is reasonably foreseeable that the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$20,000 or more; or
- incurring or avoiding expenses for a fiscal year of \$5,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$20,000 or more. 2 CCR § 18705.1(c)(4).

b. DECISIONS INVOLVING AN ECONOMIC INTEREST IN REAL PROPERTY

i. DIRECTLY INVOLVED.

With the exception of the special rules noted below, the effect of a decision on real property that is directly involved is presumed material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the decision will have any financial effect on the real property. 2 CCR § 18705.2.

Special Rule for Property Within 500 Feet of the Subject of the Decision. Ordinarily, an economic interest is directly involved in a decision only if it is the subject of the decision. For real property, the FPPC also treats property within 500 feet of the boundary of the property that is the subject of a governmental decision as directly involved in the decision. 2 CCR § 18704.2(a). (If the official's property is beyond 500 feet from the boundary of the property that is the subject of the decision, the test for property indirectly involved applies.)

Leasehold Interests. For a leasehold interest that is directly involved, the decision's effect is presumed material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the decision will have an effect on:

- the termination date of the lease;
- the amount of rent paid by the tenant for the leased property;
- the value of the tenant's right to sublease the property;
- the legally allowable use or the current use of the property by the lessee; or
- the use or enjoyment of the leased property by the tenant. 2 CCR § 18705.2(a)(2).

ii. INDIRECTLY INVOLVED

With the exception of the special rule for leaseholds noted below, the effect of a decision on real property that is indirectly involved in the decision is presumed not material. This presumption may be rebutted by proof that there are specific

circumstances regarding the nature of the governmental decision, its financial effect, and the nature of the real property, which make it reasonably foreseeable that the decision will have a material financial effect on the property. Examples of specific circumstances include, but are not limited to effects on:

- o the development potential or income producing potential of the property;
- o the use of the property;
- o the character of the neighborhood including, but not limited to substantial effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. 2 CCR § 18705.2(b)(1).

Leasehold Interests. For indirectly involved leasehold interests, the decision's effect is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the property, which make it reasonably foreseeable that the decision will:

- o change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;
- o change the lessee's actual use of the real property;
- o substantially enhance or significantly decrease the lessee's use or enjoyment of the real property;
- o increase or decrease the amount of rent for the property by 5% or more during any 12-month period following the decision; or
- o result in a change in the termination date of the lease. 2 CCR § 18705.2(b)(2).

c. DECISIONS INVOLVING THOSE WHO ARE SOURCES OF INCOME OR GIFTS

i. DIRECTLY INVOLVED.

Any reasonably foreseeable financial effect on a person who is the source of income or gifts to a public official and who is directly involved in a decision before the official's agency is deemed material. 2 CCR § 18705.3(a).

ii. INDIRECTLY INVOLVED.

For determining whether a decision has a material effect on a person who is a source of income and is indirectly involved in a decision, the following standards apply:

Business Entity. If the source of income or gifts is a business entity, the materiality standards described above for indirectly involved business entities apply. 2 CCR § 18705.3(b)(1).

Nonprofit Entity. If the source of income or gifts is a nonprofit entity, including a governmental entity, the following standards apply:

For an entity with gross annual receipts of \$400,000,000 or more, the decision will:

- affect gross revenues for a fiscal year by \$1,000,000 or more; or
- affect expenses for a fiscal year by \$250,000 or more; or
- affect assets or liabilities by \$1,000,000 or more.

For an entity with gross annual receipts of between \$100,000,000 and \$400,000,000, the decision will:

- affect gross revenues for a fiscal year by \$400,000 or more; or
- affect expenses for a fiscal year by \$100,000 or more; or
- affect assets or liabilities by \$400,000 or more.

For an entity with gross annual receipts of more than \$10,000,000 but less than or equal to \$100,000,000, the decision will:

- affect gross revenues for a fiscal year by \$200,000 or more;
- affect expenses for a fiscal year by \$50,000 or more;
- affect assets or liabilities by \$200,000 or more.

For an entity with gross annual receipts of more than \$1,000,000 but less than or equal to \$10,000,000, the decision will:

- affect gross revenues for a fiscal year by \$100,000 or more; or
- affect expenses for a fiscal year by \$25,000 or more; or
- affect assets or liabilities by \$100,000 or more.

For an entity with gross annual receipts of more than \$100,000 but less than or equal to \$1,000,000, the decision will:

- affect gross revenues for a fiscal year by \$50,000 or more; or
- affect expenses for a fiscal year by \$12,500 or more; or
- affect assets or liabilities by \$50,000 or more.

For an entity with gross annual receipts of \$100,000 or less, the decision will:

- affect gross revenues for a fiscal year by \$10,000 or more; or
 - affect expenses for a fiscal year by \$2,500 or more; or
 - affect assets or liabilities by \$10,000 or more.
- 2 CCR § 18705.3(b)(2).

Individuals. The effect of a decision is material as to individuals who are sources of income or gifts and indirectly involved in the decision if any of the following applies:

- the decision will affect the individual's income, investments or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or
 - the decision will affect the individual's real property interest in a manner that is considered material under the materiality standards applicable to real property indirectly involved in a decision.
- 2 CCR § 18705.4.

Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the decision. 2 CCR § 18705.3(c).

d. DECISIONS INVOLVING PERSONAL FINANCIAL EFFECT

A reasonably foreseeable personal financial effect of at least \$250 in any 12-month period is material. Neither a financial effect on the value of real property nor a financial effect on a business entity should be considered when determining whether a decision will have a personal financial effect on a public official or employee. 2 CCR § 18705.5.

If the effect of a decision does not meet the materiality standards, the public official does not have a conflict under the Act.

6. IS IT REASONABLY FORESEEABLE THAT THE DECISION WILL HAVE A MATERIAL FINANCIAL EFFECT?

After identifying the appropriate materiality test, the public official must inquire whether such an effect is reasonably foreseeable. The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Substantial likelihood means more than a mere possibility, but less than a certainty. 2 CCR § 18706.

If it is not reasonably foreseeable that the decision will have a material financial effect under the applicable standard, the public official does not have a conflict under the Act.

7. IS THE EFFECT OF THE DECISION ON THE OFFICIAL'S ECONOMIC INTEREST DISTINGUISHABLE FROM THE EFFECT ON THE PUBLIC GENERALLY?

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. The regulations interpreting the Act contain specific rules for determining when a decision affects a significant segment of the public in substantially the same manner as the public official. 2 CCR § 18707.

If the public official's economic interest will be affected in the same manner as the public generally, as defined in the Act, the public official may participate in the decision.

8. IS THE PUBLIC OFFICIAL'S PARTICIPATION LEGALLY REQUIRED?

In some cases, even where an official has a conflict of interest, the official may participate if his or her participation is legally required. This exception is very narrow. Participation is legally required only if there is no officer or entity that may make the decision consistent with the purposes and terms of the statute authorizing the decision. This exception does not permit an official who is otherwise disqualified to break a tie or vote if a quorum of members of the agency who are not disqualified could be obtained. 2 CCR § 18708.

B. FINANCIAL DISCLOSURE UNDER THE CALIFORNIA POLITICAL REFORM ACT

In addition to prohibiting participation in government decisions that affect a public official's financial interests, the Political Reform Act requires public officials with significant decision making authority to publicly disclose their financial interests. The required financial disclosure informs the public about a public official's economic interests and potential conflicts of interest.

1. WHO IS REQUIRED TO FILE STATEMENTS OF ECONOMIC INTERESTS?

All local public officials (including elected officials, candidates for elective office, appointed officials, and employees) who make, or participate in making, governmental decisions that could affect their personal financial interests are required to file financial disclosure forms. Govt. Code §§ 87200; 87302. These forms are called "statements of economic interests," and are also known as "SEIs" or "Form 700s." The list of local appointed officials and employees who are required to file SEIs is set forth in San Fran-

cisco's Conflict of Interest Code in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. Individuals who hold positions listed in these sections are called "designated employees."

Appointing authorities of officers who file SEIs with the Ethics Commission must notify the Ethics Commission within 15 days that a person has been appointed to, or left office, in order to enable the Ethics Commission to monitor compliance with the SEI filing requirements.

2. WHAT MUST BE DISCLOSED ON STATEMENTS OF ECONOMIC INTERESTS?

Depending upon the positions they hold, public officials who are required to file SEIs must disclose some or all of their interests in real property located in San Francisco, investments, business positions, and income (including gifts and loans) received during the preceding 12 months. See Govt. Code § 87302; 2 CCR § 18730; C&GC Code § 3.1-100, et seq.

The amount of financial disclosure required depends upon the nature of the position held by a particular public official. Some public officials, such as elected City officials and members of the Planning Commission, file SEIs pursuant to State law, which determines how much information these officials must disclose. Most other public officials file SEIs pursuant to San Francisco's Conflict of Interest Code. The Conflict of Interest Code is proposed by each department and is approved by the Board of Supervisors. The Conflict of Interest Code identifies the individuals in each department who must file SEIs and specifies the filing requirements for those individuals. The Conflict of Interest Code is set forth in San Francisco Campaign and Governmental Conduct Code sections 3.1-100 – 3.1-500. Each public official should check these provisions to determine his or her disclosure obligations.

3. WHEN MUST STATEMENTS OF ECONOMIC INTERESTS BE FILED?

Public officials who are required to file statements must file an initial "assuming office statement" within 30 days of taking office. A "leaving office statement" must be filed within 30 days of leaving office. While in office, a public official must file an "annual statement" on or before April 1 of each year. Govt. Code § 87302; 2 CCR § 18730. See also 2 CCR § 18732 (filing dates if assume office between October 1 and December 31); § 18735 (filing dates for designated employees who change positions).

4. WHERE ARE STATEMENTS OF ECONOMIC INTERESTS FILED?

Members of Boards and Commissions and Department Heads must file their SEIs with the Ethics Commission. Agency heads of the Unified School District, the Community

College District, the San Francisco Housing Authority, the Redevelopment Agency, the Office of Citizen Complaints, and the Law Library also file with the Ethics Commission. Members of the Civil Grand Jury must file their SEIs with the Executive Officer of the Superior Court. Employees must file their forms with their department heads or the executive director of their agency. See C&GC Code § 3.1-103.

Sunshine Affidavit Required for Officials who File SEIs with the Ethics Commission:

Each official who files an SEI with the Ethics Commission must also file an affidavit with the Ethics Commission stating that the official has read the San Francisco Sunshine Ordinance and has attended, or will attend, a Sunshine Ordinance training sessions provided by the City Attorney's Office and the Sunshine Ordinance Task Force. The Ethics Commission provides a form for this purpose. These forms must be filed within 30 days of assuming office and once each year by April 1. For further information about this requirement, see the section of this guide addressing the Sunshine Ordinance. See Admin. Code § 67.33; EC Reg. 67.33-1.

Financial disclosure forms may be obtained from the San Francisco Ethics Commission or downloaded from the FPPC's Web site at <http://www.fppc.ca.gov>. The Ethics Commission and the FPPC provide assistance in completing the forms. The Ethics Commission's telephone number is (415) 581-2300 and the FPPC's number is (866) 275-3772. In addition, Deputy City Attorneys Claire Sylvia (554-4706) and Chad Jacobs (554-4677) will assist you with questions regarding completion of the forms.

5. WHAT ARE THE CONSEQUENCES OF NOT FILING THE FORMS OR NOT DISCLOSING REQUIRED INFORMATION?

Failure to comply with these reporting requirements may result in criminal and civil sanctions. The Political Reform Act provides for civil penalties in the amount of \$5000 per violation, or three times the amount not reported. In addition, there is a \$10 a day fine (up to a maximum of \$100) for late filings. In addition, local law now provides that an officer or employee may be subject to discipline or removal from office for failure to file. See C&GC Code § 3.1-102.5.

6. MAY I AMEND MY STATEMENT OF ECONOMIC INTERESTS?

If you discover an error after you file your SEI, you must amend your filing. The Ethics Commission has amendment forms for this purpose. You may also download amendment forms from the FPPC'S Web site at <http://www.fppc.ca.gov>.

7. WHO HAS ACCESS TO STATEMENTS OF ECONOMIC INTERESTS?

SEIs are public records. Any member of the public may review and copy a public official's SEI. Govt. Code § 81008.

C. CONFLICTS OF INTEREST UNDER THE POLITICAL REFORM ACT BASED ON SOLICITATION AND RECEIPT OF CAMPAIGN CONTRIBUTIONS BY APPOINTED BOARDS AND COMMISSIONS

Government Code section 84308 prohibits members of appointed boards and commissions from soliciting contributions in excess of \$250 from persons who are parties to, or participants in, proceedings pending before them and from making decisions affecting a source of campaign contributions of more than \$250.

1. WHO IS COVERED?

Section 84308 applies to appointed boards and commissions. Although the section does not apply to elected bodies, such as the Board of Supervisors, when members of an elected body are sitting as members of an appointed body, they are subject to section 84308. If the entire body is made up of elected officials, as for example, where a Board of Supervisors is designated to sit as the Redevelopment Agency, section 84308 does not apply to the body. 2 CCR § 18438.1.

2. WHAT DOES SECTION 84308 PROHIBIT?

Section 84308 prohibits two things: soliciting contributions above a certain amount from participants in proceedings before the official, and participating in decisions involving certain contributors.

a. BAN ON SOLICITING CONTRIBUTIONS GREATER THAN \$250

Section 84308 prohibits an appointed officer from soliciting, accepting or directing campaign contributions of more than \$250 from any party, participant or agent of a party or participant:

- while a proceeding is pending before the officer's agency; and
- for three months following the date of the decision.

This prohibition applies even where the contribution is directed to a person other than the officer. Similarly, a party, participant or an agent cannot make a campaign contribution of more than \$250 to an officer during the course of the proceedings and for three months following the decision.

An officer “solicits” a contribution only if the officer knows or has reason to know that the person being solicited is a party or participant (or the agent of either) and personally requests the contribution or knowingly allows his or her agent to do so. A prohibited solicitation under section 84308 does not include a request made in a mass mailing to the public, at a public gathering, or in a published newspaper or other mass media.

b. DISQUALIFICATION

Section 84308 prohibits an officer from participating in a decision when prior to making the decision, he or she learns that a party or participant in a proceeding has made a campaign contribution of more than \$250 to the officer within the prior 12 months. If the officer returns the contribution (or the portion of the contribution over \$250) within 30 days of the time that he or she learns of the contribution and the proceeding, then disqualification is not required.

Unlike the prohibition on soliciting contributions, the disqualification requirement applies only if the contribution was made to the officer. Disqualification is not required if the officer solicited contributions for other people.

An officer who has received a campaign contribution of \$250 or more within the prior 12 months from a party or participant in a proceeding (or their agents) must disclose that fact on the record of the proceeding. The party who made a contribution to an officer in the 12 months prior to the decision also has a duty to disclose the contribution.

3. WHAT IS A PROCEEDING?

A proceeding is an action to grant, deny, revoke, restrict or modify any license, permit or other entitlement for use. This includes proceedings on all business, profession, trade and land use licenses and permits. It also includes contracts (other than competitively bid, labor, or personal employment contracts) and all franchises. A proceeding does not include action on rules of general application, such as adoption of a general plan or development standards. 2 CCR § 18438.2(a).

4. WHEN IS A PROCEEDING PENDING?

A proceeding is pending when:

- an application has been filed;
- the proceeding has commenced;

- or the issue has otherwise been submitted to the jurisdiction of the agency for determination. 2 CCR § 18438.2.

5. WHO IS A PARTY, PARTICIPANT OR AGENT?

A party is a person who files an application for or is the subject of a proceeding involving a license, permit, or other entitlement for use. A participant is any person who is not an actual party to the proceeding but who actively supports or opposes a particular decision by lobbying the agency, testifying, or otherwise seeking to influence the agency and who has a financial interest in the outcome of the decision. An agent is an individual or firm who represents a party or participant in the proceeding. 2 CCR §§ 18438.3; 18438.4.

D. CONFLICTS OF INTEREST UNDER GOVERNMENT CODE SECTION 1090

California Government Code Section 1090 prohibits public officials from being financially interested in a contract made by them or by the boards or commissions of which they are members. Unlike conflicts of interest under the Political Reform Act, which may be addressed by abstaining from participating in a decision, a conflict of interest under Government Code Section 1090 may require that a public official choose between maintaining a private interest and remaining in public office. Contracts made in violation of Section 1090 are void and violation of this section may subject a public official to severe sanctions.

As further described below, there are some exceptions to the requirement of Section 1090 that individuals with a financial interest in a contract must choose between the private interest and continued service on a Board or Commission.

1. WHAT IS A FINANCIAL INTEREST?

Section 1090 does not define the term financial interest. The courts have made clear that they will not construe the term “in a restrictive and technical manner.” *People v. Honig* (1996) 48 Cal.App.4th 289. Section 1090 is “concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [City].” *Honig*, 48 Cal.App. 4th at 315.

2. WHAT CONSTITUTES MAKING A CONTRACT?

The statute does not define making a contract. The courts have construed this term broadly to serve the statute’s purposes. Courts have held that the term extends to the planning, preliminary discussion, compromises, drawing of plans and specifications, and solicitations of bids that lead to the formal making of a contract. *Stigall v. City of Taft*

(1962) 58 Cal.2d 565, 569. The California Attorney General has stated that participation in the initial stages of making a contract can preclude a public official from seeking a contract after leaving office.

3. REMOTE INTERESTS

Government Code section 1091 identifies several “remote interests,” or exceptions to Government Code section 1090. Remote interests are financial interests that the legislature has deemed sufficiently remote that an official with such an interest may abstain from voting on a matter in which the official has an interest rather than resign from the board or commission.

Remote interests include, for example, the interest of a landlord or tenant of the contracting party or that of an officer of a nonprofit corporation. The Appendix to this guide includes a copy of section 1091, which lists the various remote interests. When a public official has a “remote interest,” he or she may remain on the board or commission that votes on the contract, but the member with the remote interest must announce his or her interest on the record and abstain from voting on the matter involving the remote interest.

4. NONINTERESTS

Government Code Section 1091.5 identifies some “noninterests.” These are situations that the legislature has determined do not present a conflict of interest. A list of these noninterests may be found in the Appendix to this guide, which includes a copy of section 1091.5. If a member of a board or commission has a noninterest, section 1090 does not prohibit the official from voting on the matter involving the noninterest.

Even where Government Code Section 1090 would not preclude an official’s participation in a decision, the public official must still ensure that the Political Reform Act would not bar participation in the decision.

E. CONFLICTS OF INTEREST UNDER THE COMMON LAW

Before the State legislature enacted statutes on conflicts of interest, the State courts developed a common law conflict of interest doctrine. Although it is unclear whether this doctrine applies in areas governed by statute, public officials should also consider this doctrine in assessing a proposed course of conduct. Generally, the doctrine provides that a public official owes an undivided duty of loyalty to the public. Where a governmental decision involves a conflict between a public official’s duty of loyalty to the public and duty of loyalty to a private interest, the public official should avoid participating in the decision. See *Noble v. City of Palo Alto*, 89 Cal.App. 47, 51 (1928).

F. CONFLICTS OF INTEREST UNDER THE CAMPAIGN AND GOVERNMENTAL CONDUCT CODE

1. INCORPORATION OF STATE LAW

Campaign and Governmental Conduct Code section 3.206 incorporates the conflict of interest provisions of the California Political Reform Act and California Government Code section 1090. Section 3.206(a) incorporates by reference the Political Reform Act's conflict of interest prohibition and section 3.206(b) incorporates by reference Government Codes section 1090's prohibition on conflicts of interest.

2. APPOINTMENTS AND NOMINATIONS

Campaign and Governmental Conduct Code section 3.208 provides that no person may give or promise and no officer or employee of the City and County may solicit or accept, any money or other valuable thing in consideration for the person's, or any other person's, nomination or appointment to any City and County office, employment, promotion, or for other favorable employment action.

3. PROHIBITION ON VOTING ON OWN CHARACTER OR CONDUCT

Campaign and Governmental Conduct Code section 3.210 prohibits a member of a board or commission from knowingly voting on or in any way attempting to influence the outcome of governmental action involving his or her own character or conduct, his or her right as a member, or his or her appointment to any office, position, or employment. This section does not prohibit any officer or employee from

- responding to allegations;
- applying for an office, position, or employment;
- responding to inquiries; or
- participating in the decision of his or her board, commission, or committee to choose him or her as chair, vice chair, or other officer of the board, commission, or committee.

4. DECISIONS INVOLVING FAMILY MEMBERS

In addition to the general prohibitions on making decisions in which a public official has a financial interest, section 3.212 of the Campaign and Governmental Conduct Code prohibits officers and employees of the City and County from making, participating in making, or seeking to influence a decision of the City and County regarding an employment action involving a relative.

Nothing in this section prohibits an officer or employee from acting as a personal reference or providing a letter of reference for a relative who is seeking appointment to a position in any City department, board, commission, or agency other than the officer or employee's department, board, commission, or agency or under the control of any such department, board, commission, or agency.

When this section prohibits a department head from participating in an employment action involving a relative, the department head must delegate in writing to an employee within the department any decisions regarding such employment action.

For purposes of this prohibition, the term "employment action" means hiring, promotion or discipline. The section does not apply to an appointment or other decisions related to holding a City office or position that is nonsalaried. See EC Reg. 3.212-1. The term "relative" means a spouse, domestic partner, parent, grandparent, child, sibling, parent-in-law, aunt, uncle, niece, nephew, or first cousin and includes any similar step relationship or relationship created by adoption.

5. DISCLOSURE OF PERSONAL, PROFESSIONAL AND BUSINESS RELATIONSHIPS

Section 3.214 of the Campaign and Governmental Conduct Code requires City officers and employees to disclose on the public record any personal, professional, or business relationship with any individual who is the subject of, or has an ownership or financial interest in, the subject of a governmental decision being made by the officer or employee. This disclosure requirement applies only if, as a result of the relationship, the ability of the officer or employee to act for the benefit of the public could reasonably be questioned. Disclosure on the public record means inclusion in the minutes of a public meeting, or if the decision is not being made at a public meeting, recorded in a memorandum kept on file at the offices of the City officer or employee's department, board, or commission.

The Ethics Commission has adopted regulations detailing the types of personal, professional, and business relationships that this section requires to be disclosed. See EC Regs. 3.212-1 to 3.212-6. The regulations define personal, professional, or business relationships as follows:

- **Personal relationship.** A personal relationship is a relationship involving a family member or a personal friend, but does not include a mere acquaintance.
- **Professional relationship.** A professional relationship is a relationship with a person based on regular contact in a professional

capacity, including regular contact in conducting volunteer and charitable activities.

- **Business relationship.** An officer has a business relationship with a person if, within the two years prior to the decision, the person was a client, business partner, colleague, or did business with the officer or employee's business. A business relationship does not include a person with whom the officer or employee does business in a personal capacity, such as a grocery store owner. EC Reg. 3.212-5.

A court may void any governmental decision made by a City officer or employee who fails to make the disclosure required by this section if the failure to disclose was willing and the City officer or employee failed to make his or her decision (1) with disinterested skill, zeal and diligence, and (2) primarily for the benefit of the City. Other than discipline by an appointing authority, no penalty may be imposed for a violation of this section.

6. RECEIPT OF BENEFITS FOR REFERRALS AND COERCION IN CONTRACTING

Section 3.226 of the Campaign and Governmental Conduct Code prohibits an officer or employee from receiving any money, gift, or other thing of economic value from a person or entity other than the City and County of San Francisco for referring a member of the public to a person or entity for any advice, service or product related to the processes of the City and County.

Section 3.226 also prohibits an officer or employee from conditioning any governmental action on a member of the public hiring, employing or contracting with any specific person or entity. This section does not apply to a City department, board, commission or agency that requires as part of an award of a contract that the primary contractor use sub-contractors listed in the primary contractor's proposal or bid. See EC Reg. 3.226-1.

The Ethics Commission may waive this restriction if it determines that granting a waiver is necessary for the proper administration of a governmental program or action. See EC Reg. 3.226-1.

III. OTHER PROHIBITIONS

Public officials are subject to a number of other state and local laws governing official conduct that seek to restrict conflicts between outside activities and public duties. The following is a brief description of some of these provisions.

A. PROHIBITION ON REPRESENTING PRIVATE PARTIES BEFORE OTHER CITY OFFICERS AND EMPLOYEES: COMPENSATED ADVOCACY

Section 3.224 of the Campaign and Governmental Conduct Code prohibits any officer of the City from directly or indirectly receiving any compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision.

This section does not apply to any communication by:

- an officer of the City and County on behalf of the City and County;
- an officer of the City and County on behalf of a business, union, or organization of which the officer is a member or full-time employee;
- an associate, partner, or employee of an officer of the City and County unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City and County officer; or
- a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter.

Intent to influence means any communication made for the purpose of supporting, promoting, influencing, modifying, opposing, delaying or advancing a governmental decision, but does not include communications that:

- involve only routine requests for information such as a request for publicly available documents;
- are made as a panelist or speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- are made while attending a general informational meeting, seminar, or similar event; or are made to the press.

The Ethics Commission may waive the prohibitions in this section for any member of a City Board or Commission who by law must be appointed to represent any profession, trade, business, union or association.

B. RESTRICTIONS ON FUTURE EMPLOYMENT

The City has several laws that limit the employment activities of officers or employees after they leave City service. All City officers and employees are permanently barred from switching sides on a particular matter that they were personally and substantially involved in while in City service. In addition, for one year after leaving City service, officers and employees may not seek to influence their former department or other government unit. City officers and employees are also prohibited from accepting employment with certain City contractors for a year. The Mayor and members of the Board of Supervisors, are subject to somewhat broader post-employment restrictions than those that apply to other City officers and employees. Individuals subject to these rules may request waivers under some circumstances.

1. ALL OFFICERS AND EMPLOYEES

All City officers and employees are subject to a permanent ban on certain types of post-employment activities, and a one-year ban on activities related to lobbying their former department.

a. PERMANENT BAN

The permanent ban on certain post-employment activities is similar to the State law that applies to State officers and employees. Under section 3.234(a)(1)(A), City officers and employees are permanently banned from acting as an agent, attorney, or otherwise representing any other person, other than the City and County, before any court or before any state, federal or local agency (or any officer or employee of such an court or agency) by making any formal or informal appearance or by making any oral, written or other communication in connection with a particular matter if:

- 1) the City and County is a party or has a direct and substantial interest in the matter;
- 2) the former officer or employee participated personally and substantially as a City officer or employee in the matter;
- 3) the matter involved a specific party or parties at the time of the officer or employee's participation; and

- 4) the matter is the same as the matter in which the officer or employee participated as a City officer or employee.

Section 3.234(a)(1)(B) imposes a permanent ban on aiding, advising, counseling, consulting or assisting another person (other than the City and County) in any proceeding in which the officer or employee would be precluded from participating personally.

The permanent ban does not apply to testimony as a witness based on the personal knowledge of the former officer or employee, provided that no compensation is received other than fees regularly provided for by law or regulation to witnesses. C&GC Code § 3.234(a)(1)(C).

b. ONE YEAR BAN

In addition to the permanent ban, City officers and employees are prohibited for one year after terminating their City service, from, with an intent to influence a government decision, communicating orally, in writing, or in any other manner on behalf of any other person (except the City and County) with any officer or employee of the department, board, commission, office, or other unit of government, for which the officer or employee served. C&GC Code § 3.234(a)(1)(D).

c. WAIVER

The Ethics Commission may waive the post-employment restrictions if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. The Ethics Commission may also waive any of these restrictions for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business, union or association.

The Ethics Commission has adopted regulations implementing the waiver provision, and setting forth a process for requesting a waiver. See EC Reg. 3.234-4.

d. FUTURE EMPLOYMENT

City officers and employees are subject to two additional limits on future employment: a one year ban on employment with certain city contractors and a prohibition on making decisions affecting a person or entity with whom the officer or employee is discussing or negotiating future employment.

i. ONE YEAR BAN ON EMPLOYMENT WITH CERTAIN CITY CONTRACTORS

Section 3.234(a)(2) prohibits City officers and employees, for one year after termination of City service, from being employed by or otherwise receiving compen-

sation from a person or entity that entered into a contract with the City within the 12 months prior to the officer or employee leaving City service where the officer or employee personally and substantially participated in the award of the contract.

The Ethics Commission may waive this prohibition if the Commission determines that imposing the restriction would cause extreme hardship for the former City officer or employee. The Ethics Commission has adopted regulations implementing this provision. EC Reg. § 3.234-4.

**ii. MAKING DECISIONS AFFECTING A PERSON WITH WHOM YOU ARE
NEGOTIATING FUTURE EMPLOYMENT**

The Political Reform Act prohibits City employees from making, participating in making, or seeking to influence a Government decision affecting a person or entity with whom the employee is discussing or negotiating future employment. Govt. Code § 87407.

Campaign and Governmental Conduct Code section 3.206(c) also prohibits City employees from making, participating in making, or seeking to influence, government decisions affecting a person or entity with whom the employee is discussing or negotiating future employment.

**2. SPECIAL PROVISIONS APPLICABLE TO THE MAYOR AND MEMBERS OF THE
BOARD OF SUPERVISORS**

a. ONE YEAR BAN

For purposes of the Campaign and Governmental Conduct Code's one year ban applicable to all employees, the "department" for which a former Mayor or member of the Board of Supervisors served shall be the entire City and County. C&GC Code § 3.234(b)(1). The prohibition extends to communications with:

- a board, department, commission, or agency of the City and County;
- an officer or employee of the City and County;
- an appointee of a board, department, commission, agency, officer, or employee of the City and County; or
- a representative of the City and County.

b. CITY SERVICE

No former Mayor or member of the Board of Supervisors shall be eligible for a period of one year after the last day of service as Mayor or member of the Board of Supervi-

sors, for appointment to any full time, compensated employment with the City. C&GC Code § 3.234(b)(2).

This restriction does not apply to a former Mayor or Supervisor elected to an office of the City and County, appointed to fill a vacancy in an elective office of the City and County, or appointed to a board or commission in the executive branch.

C. INCOMPATIBILITY

1. INCOMPATIBLE ACTIVITIES

Government Code section 1126 prohibits City officials from engaging in compensated activities that are incompatible with their official duties. Local law implements this provision in Campaign and Governmental Conduct Code section 3.218. This new section provides that no officer or employee of the City and County may engage in any employment, activity or enterprise that the department, board, commission or agency of which he or she is a member or employee has identified as incompatible in a statement of incompatible activities adopted under Campaign and Governmental Conduct Code section 3.218.

In order to implement section 3.218, each department, board, commission and agency of the City and County was required to submit to the Ethics Commission a statement of incompatible activities by August 1, 2004. No statement of incompatible activities becomes effective until approved by the Ethics Commission. The Ethics Commission must find that the listed activities are incompatible under the criteria set forth in section 3.218(c). Section 3.218(c) requires departments to list those activities that are “inconsistent, incompatible, or in conflict with” the duties of the officer and employee and sets forth language that is required in every statement of incompatible activities.

a. REQUIRED LANGUAGE

Each department’s incompatible activities statement must list those activities that are inconsistent or incompatible or in conflict with the duties of the officers and employees of the department, board, commission or agency. The list must include, but is not limited to, activities that involve:

- the use of the time, facilities, equipment and supplies of the City and County or the badge, uniform, prestige or influence of the City and County officer or employee’s position for private gain or advantage;
- the receipt or acceptance by an officer or employee of the City and County of any money or other thing of value from anyone other than the City and County for the performance of an act that the

officer or employee would be required or expected to render in the regular course of his or her service or employment with the City and County;

- the performance of an act in a capacity other than as an officer or employee of the City and County that may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement of the City and County officer or employee's department, board, commission or agency; and
- time demands that would render the performance of the City and County officer and employee's duties less efficient.

The Ethics Commission may permit City Boards and Commissions to exclude any required language from their statement of incompatible activities if their members, by law, must be appointed in whole or in part to represent any profession, trade, business, union, or association.

Until the statement of incompatible activities under this section is adopted for a department, board, commission, or agency, the rules and regulations relating to outside activities previously adopted or approved by the Civil Service Commission shall remain in effect. As of the date of this publication, the Ethics Commission has not yet approved department statements of incompatible activities.

b. AMENDMENT OF INCOMPATIBLE ACTIVITIES STATEMENT

A department, board, commission or agency may amend its statement of incompatible activities, subject to the approval of the Ethics Commission. The Ethics Commission may, at any time, amend the statement of incompatible activities of any department, board, commission or agency.

c. NOTICE TO OFFICERS AND EMPLOYEES

i. MEET AND CONFER

No statement or amendment may be operative until the City and County has complied with the meet and confer requirements of State law.

ii. ANNUAL NOTICE

Once the statements are adopted, every department, board, commission, and agency must annually provide to its officers and employees a copy of its statement of incompatible activities.

iii. OPPORTUNITY TO CONTEST

No officer or employee may be subject to discipline or penalties under this section unless he or she has been provided an opportunity to demonstrate that his or her activity is not in fact inconsistent, incompatible, or in conflict with the duties of the officer or employee.

2. DUAL OFFICE-HOLDING FOR COMPENSATION

Campaign and Government Conduct Code section 3.220 prohibits any person holding an office under the City and County with an annual salary of more than \$2500, from holding any other office with such a salary under the government of the United States, the State of California, or the City and County. The term “salary” does not include a stipend, per diem, or other payment provided for attendance at meetings; health, dental, or vision insurance; or other non-cash benefits. A person who violates this provision is deemed to have vacated the City and County office.

3. INCOMPATIBLE OFFICES

The common law prohibits public officials from holding incompatible offices. Offices are incompatible, in the absence of statutes indicating otherwise, if the duties of the two offices will result in a significant clash of loyalties, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervisory, auditory, or removal power over the other. *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636 (1940). A person who violates this section is deemed to have vacated the first office.

D. PROHIBITION ON CONTRACTING WITH THE CITY

Section 3.222 of the San Francisco Campaign and Governmental Conduct Code prohibits members of appointed boards and commissions, other than advisory bodies, from contracting with the City, the School District, the Redevelopment Agency, the Housing Authority or the Community College District. This provision applies to any contract or subcontract of \$10,000 or more per year.

This prohibition does not apply to contracts or subcontracts with nonprofit organizations, or to contracts or subcontracts entered into before a member of a board or commission commenced his or her service, or to agreements to provide goods or services at substantially below fair market value. The prohibition also does not apply to contracts or subcontracts with business entities affiliated with a member of a Board or Commission unless the official exercises management and control over the business.

E. PROHIBITION ON DISCLOSING OR USING CONFIDENTIAL INFORMATION

Campaign and Governmental Conduct Code section 3.228 prohibits City officers and employees from disclosing any confidential or privileged information unless authorized or required by law to do so.

Officers and employees are also prohibited from using any privileged information obtained by virtue of their office or employment to advance the financial or other private interests of themselves or others.

Under this section, confidential information means information that at the time of use or disclosure was not subject to disclosure under the Sunshine Ordinance or California Public Records Act

F. RESTRICTIONS ON USE OF CITY RESOURCES AND POLITICAL ACTIVITY

1. USE OF CITY RESOURCES

State law prohibits officers and employees from using public resources for campaign activity, personal purposes, or other purposes not authorized by law. Cal. Penal Code § 424; Govt. Code § 8314; *Stanson v. Mott* (1970) 17 Cal.3d 206. Misuse of public resources may be punishable by two to four years imprisonment in State prison and disqualification from holding any public office in the State, as well as civil penalties. Incidental and minimal use of public resources is not subject to criminal prosecution. Govt. Code § 8314(e); Cal. Penal Code § 424(c).

Local law specifically prohibits use of public funds to design, produce, create, mail, send or deliver any printed greeting card that celebrates or recognizes a holiday. C&GC Code § 3.232. In addition, each statement of incompatible activities adopted by City departments, boards, commissions, and agencies, must include language addressing the use of time, facilities, equipment and supplies. See *supra*, section III(C)(1) (discussing C&GC Code § 3.218).

2. RESTRICTIONS ON POLITICAL ACTIVITY

In addition to the general restriction on use of public resources for campaign activity, State and local law impose specific restrictions on political activity. California Government Code section 54964 prohibits local agencies from expending public funds to support or oppose a candidate or ballot measure.

State and local law prohibit local officers and employees from directly or indirectly soliciting funds from other officers or employees of the local agency or from persons on employment lists of the local agency, unless the solicitation is part of a solicitation made to a significant segment of the public that may include officers or employees of the agency. Govt. Code § 3205; C&GC Code § 3.230(a). Officers and employees may not participate in political activities of any kind while in uniform. Govt. Code § 3.206; C&GC Code § 3.230(b); see also EC Reg. § 3.230-1(a) (defining “in uniform”).

Officers and employees may not engage in political activity during working hours or on City premises. C&GC Code § 3.230(c). For purposes of this prohibition, the term “City premises” does not include property that is made available to the public and can be used for political purposes.

G. CONTRACTOR CONTRIBUTION BAN

San Francisco’s Campaign Finance Reform Ordinance provides that anyone who contracts with San Francisco, the San Francisco Unified School District, or the Community College District, to render any service or furnish any supplies, materials, equipment, or sell or lease land or buildings is prohibited from contributing to any candidate whose office would have to approve any such contract. This ban applies only during the period starting with “commencement of negotiations” and ending three months after either the “completion” or “termination” of contract negotiations. The Ethics Commission has adopted regulations defining when negotiations are commenced, completed and terminated. EC Reg. 1.126-1.

Negotiations are “commenced” when a prospective contractor “first communicates with a City officer or employee about the possibility of obtaining a specific contract.” This initial communication may occur in person, by telephone, or in writing, and may be initiated by the prospective contractor or the City officer or employee. *Id.*

Examples of communications between prospective contractors and City officers and employees that commence negotiations include, but are not limited to the following: A prospective contractor contacts a City officer or employee to promote himself or herself for a specific contract; a City officer or employee contacts a prospective contractor to propose that the contractor apply for a specific contract; and a prospective contractor submits a bid, proposal or response to a Request for Qualifications to compete for a specific City contract. Examples of communications between prospective contractors and City officers and employees that do not “commence” negotiations include, but are not limited to the following: Inquiries regarding a particular contract, and requests for information or documents relating to a Request for Proposal or Request for Qualifications, provided that the inquiry or request does not involve promotion of the prospective contractor’s interest in a specific contract; requests for Requests for Proposals and Requests for Qualifications; attendance at an interested persons meeting that is open to the public; and requests to be placed on a mailing list.

Negotiations are “completed” when a contract is finalized and signed by the City and the contractor. Negotiations are “terminated” when the City and/or the prospective contractor end the negotiation process before a final decision is made to award the contract. For example, if a prospective contractor formally withdraws or is disqualified from consideration for a specific contract, the negotiations have terminated. *Id.*

IV. RESTRICTIONS ON GIFTS, HONORARIA, TRAVEL & LOANS

City officers and employees are subject to a number of laws and rules restricting the receipt of gifts and requiring the reporting of gifts. This section describes the principal gift requirements, which are contained in the Political Reform Act. In addition, this section describes local gift rules.

A. GIFTS TO INDIVIDUALS

1. GENERAL

The Political Reform Act imposes gift restrictions on local elected officers and officials identified in Government Code section 87200, candidates for local elected offices, and designated employees. Designated employees are all employees who are listed in the City’s conflict of interest code and required to file a statement of economic interest. The City’s conflict of interest code can be found in Article III, Chapter 1 of the Campaign and Governmental Conduct Code. The code designates employees and officials within each City agency and specifies the financial disclosure rules that apply to the designated employees and officials.

a. GIFT LIMITS UNDER THE CALIFORNIA POLITICAL REFORM ACT

Elected officials, candidates, and officials listed in Section 87200. Local elected officers, public officials listed in Government Code section 87200 and candidates for local elective office may not accept gifts of more than \$360 from a single source in calendar year. These individuals must report gifts of \$50 or more on their statements of economic interests.

Designated employees. Employees listed in the City’s conflict of interest code may not accept gifts of more than \$360 in a calendar year from any source if they are required to report receiving income from that source on their statement of economic interests. If you are required to report income from only specific sources, gifts from other sources are not subject to the gift limit and need not be reported. Gifts of \$50 or

more from a source the employee is required to report must be reported on the employee's statement of economic interests.

Example: A member of the Art Commission is designated in the City's conflict of interest code and must file a statement of economic interest. The Code requires Art Commissioners to disclose only income from any source that does business with the Arts Commission, has done business with the Commission in the past 2 years, or may foreseeably do business with the Commission in the future. An Art Commissioner receives a brief case worth \$5,000 from a friend who owns a leather goods store and who has never done and will not do business with the Arts Commission. The Art Commissioner may accept the brief case, notwithstanding that its value exceeds the gift limit, because the source of the gift was not a source that the Commissioner must report on his SEI. In addition, the Commissioner is not required to report the gift on his SEI. If the donor of the brief case is the subject of a decision by the Art Commission within the next 12 months, the Commissioner will be disqualified from participating in making the decision because the conflicts rules prohibit him from making a decision affecting a source of gifts of \$360 or more in the 12 months prior to the decision.

Gift limits are cumulative. You must add together all gifts you receive from a single reportable source in a calendar year. The total may not exceed \$360 and if the amount of gifts exceeds \$50, you must report all of the gifts.

Example. An executive director of a City department is designated in the City's conflict of interest code and must disclose all sources of income. A City contractor takes the executive director out to lunch three times during the year, but each lunch costs only \$25. Because the total for all the lunches exceeds \$50, the executive director must report all three lunches on his statement of economic interests.

b. WHAT IS A GIFT?

A gift is any payment or benefit that you receive or accept for which you do not provide goods or services of equal or greater value. A gift includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to all members of the general public.

You have "received" or "accepted" a gift when you know that you have actual possession of the gift or when you exercise discretion or control over the gift, including discarding the gift or giving it to someone else.

If you receive a gift and take one of the following steps within 30 days of receipt of the gift, you will be deemed not to have received the gift and need not report it:

- o Return the gift unused;

- Donate the gift, unused, to a 501(c)(3) nonprofit organization or the government and do not take a tax deduction for the donation;
- Pay for the gift. 2 CCR § 18943.

c. EXCEPTIONS

The Act contains a number of exceptions to the broad definition of gift. 2 CCR § 18942. The following are not considered gifts under the Act:

- Gifts from family members. Gifts from your spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew or first cousin or the spouse of any such person, provided they are not acting as an intermediary for someone else.
- Gifts of hospitality. Gifts of hospitality involving food and drink or occasional lodging which you receive in an individual's home when the individual or a member of his or her family is present.
- Gifts exchanged on birthdays. Gifts of approximately equal value exchanged between you and another individual on holidays, birthdays, or similar occasions.
- Informational material. Informational material provided to assist you in the performance of your official duties, including books, reports, pamphlets, calendars, periodicals, videotapes or free or discounted admission to conferences or seminars.
- Bequest or inheritance. A bequest or inheritance is not a gift, but if you receive tangible items as part of a bequest, such as property or stock, these items may have to be reported as investments.
- Campaign contributions. Campaign contributions are not gifts under the Act, but are subject to other reporting and regulatory requirements.
- Personalized plaques and trophies of less than \$250.
- Tickets to fundraisers for political campaigns or for 501(c)(3) non-profit organizations.

- Free admission and refreshments at an event where you give a speech. Transportation within California and directly related lodging and subsistence for events at which you give a speech are also not gifts.
- Passes or tickets to facilities, goods, or services that you do not use and do not give away.
- Gifts given directly to members of your family. Gifts given directly to members of your family are not gifts to you unless you receive a direct benefit from the gift or you exercise discretion and control over the gift.

Example: Your spouse works for a computer company. One of her colleagues gives your spouse a piece of artwork to celebrate her latest deal and she displays the art in her office. You have not received a gift from the colleague. If the colleague gives your spouse a gift of a television, which you both use, then you have received the full value of the television as a gift from the colleague because you receive a direct benefit from the gift. If the colleague gives your spouse several tickets to the opera and she gives one ticket to you, you have received a gift from your spouse, not from her colleague. If the colleague gives tickets to you and your spouse, then you have received a gift of your ticket. If it appears under the circumstances that the colleague intended to give the tickets to you as a public official, and not to your spouse, you may be responsible for the value of all of the tickets.

- Gifts provided by your government agency. See also section IV(B), below, discussing gifts given to a government agency that are distributed to officials and employees of the agency.

d. GIFTS THAT ARE REPORTABLE BUT NOT SUBJECT TO THE GIFT LIMIT

The following gifts must be reported on your statement of economic interests, but are not subject to the gift limit.

- **Wedding gifts.** One half of the gift must be attributed to the public official, unless the gift is intended for the exclusive enjoyment of one spouse, in which case the gift is attributable to that individual.
- **Prize or award.** A prize or award received in a bona fide competition not related to your official status is not subject to the gift limit,

but must be reported as income if the value of the prize or award is \$500 or more.

You are disqualified from making a decision affecting a source of gifts of \$360 or more in the 12 months prior to the decision, even if the gift is not subject to the gift limit.

2. DISQUALIFICATION

Whether or not you file a Statement of Economic Interests, you are prohibited from making, participating in making, or seeking to influence any governmental decision affecting any person or entity that was a source of \$360 or more in gifts to you in the 12 months preceding the date of the decision. See section II(A).

2. LOCAL GIFT RESTRICTIONS

In addition to the Political Reform Act's requirements, the City has gift rules, found in sections 3.216 and 2.115 of the Campaign and Governmental Conduct Code. Departments may also impose additional gift restrictions on their officers or employees.

a. PROHIBITION ON BRIBERY

Section 3.216(a) of the Campaign and Governmental Conduct Code prohibits any person from offering or making, and any officer or employee from accepting, any gift with the intent that the City officer or employee will be influenced thereby in the performance of any official act.

b. LIMITS ON GIFTS FROM A RESTRICTED SOURCE

Section 3.216(b) of the Campaign and Governmental Conduct Code provides that no officer or employee of the City and County shall solicit or accept any gift in excess of \$100 in a calendar year from a person who the officer or employee knows or has reason to know is a restricted source. The Ethics Commission may adjust this amount annually to reflect changes in the Consumer Price Index.

A restricted source means:

- A person doing business with or seeking to do business with the department of the officer or employee; or
- any person who during the prior 12 months knowingly attempted to influence the officer or employee in any legislative or administrative action.

For purposes of this section, the term gift has the same meaning as under the Political Reform Act. See *supra*, section (IV)(A)(1)(b).

c. GIFTS FROM SUBORDINATES

Section 3.216(c) of the Campaign and Governmental Conduct Code prohibits officers and employees from soliciting or accepting anything of value from any subordinate, or employee or from any candidate or applicant for a position as an employee or subordinate under him or her.

The Ethics Commission has adopted regulations implementing this section. These regulations exempt certain voluntary gifts that are given or received for special occasions or under other circumstances in which gifts are traditionally given or exchanged. See EC Reg. 3.216-1. For example, gifts, other than cash, with an aggregate value of \$20 or less per occasion, given on occasions on which gifts are traditionally given, are not considered gifts for purposes of this section. Gifts, such as food and drink, without regard to value, to be shared in the office among employees, and personal hospitality provided at a residence that is of a type and value customarily provided by the employee to personal friends, are also not prohibited under this section. *Id.*

d. GIFTS FROM LOBBYISTS

Lobbyists are prohibited from making gifts to City officers aggregating more than \$50 within three months of contacting the officer. Lobbyists are also prohibited from acting as an agent or intermediary in the making of any gift (regardless of value) to a City officer, or arranging such gifts from a third party, within three months of contacting the officer. C&GC Code § 2.115(a).

Any lobbyist who gives a gift to a City officer is also required to provide the officer with notification of the gift that includes a written statement indicating the date, value and description of the gift. C&GC Code § 2.125. In addition, local law requires lobbyists to report gifts they make to City officers on quarterly activity reports filed with the Ethics Commission. C&GC Code § 2.110.

e. GIFTS FOR REFERRALS

City officers and employees are prohibited from accepting anything of value for referring a member of the public to a person or entity for any advice, service or product related to the processes of the City and County. This section is discussed under conflicts of interest. See section II(F)(6).

3. HONORARIA

a. GENERALLY PROHIBITED

Honoraria are payments for giving a speech, publishing an article, or attending a conference or other gathering. Local elected officials, officials listed in Government Code section 87200 and candidates for local elective office may not accept honoraria. Designated employees may not accept honoraria from any source they would be required to report on their statement of economic interests. Govt. Code § 89502.

If you receive an honorarium and take one of the following steps within 30 days of receipt, the payment will not be treated as an honorarium and will not be subject to reporting:

- o return the payment;
- o deliver the payment to your government agency and do not claim a tax deduction;
- o have the payment made directly to a bona fide charitable, educational, civic, religious or similar tax exempt nonprofit organization;
- o do not make the donation a condition of your speech, article or attendance;
- o do not claim a tax deduction;
- o do not be identified to the recipient; and
- o ensure that the donation has no reasonably foreseeable financial effect on you or your immediate family. 2 CCR §§ 18932-18933.

b. EXCEPTIONS

The Act provides some exceptions to the ban on honoraria:

- o Payment for dramatic, comedic, musical or other artistic performance and payment for publication of books, plays or screen plays.
- o Income for personal services. Income received in exchange for personal services provided in connection with a bona fide business, trade or profession, such as teaching, practicing law, medicine, insurance, real estate, banking or building contracting, and the services are customarily provided in connection with the business. This exception does not apply where the predominant activity of the business, trade, or profession is making speeches.

4. TRAVEL

a. THE POLITICAL REFORM ACT

The Political Reform Act treats payments for travel as gifts. A payment, advance, or reimbursement for transportation and related lodging and subsistence will be subject to the \$360 gift limit, unless one of the exceptions described below applies.

The following types of travel payments are not considered gifts and need not be reported on a statement of economic interests:

- Giving a speech in California. Transportation, necessary lodging and subsistence, free admission, refreshments, and similar non-cash nominal benefits provided directly in connection with an event at which you give a speech, participate in a panel or seminar, or provide a similar service. The exception for meals is limited to those provided the day of the event. 2 CCR § 18950.3.
- Giving a speech outside of California. Necessary lodging and subsistence, free admission, refreshments, and similar non cash nominal benefits provided directly in connection with an event at which you give a speech, participate in a panel or seminar, or provide a similar service. The exception for meals is limited to those provided the day of the event. 2 CCR § 18950.1(a).
- Travel paid for by your governmental agency. 2 CCR § 18950.1(d).
- Reimbursement for travel by a 501(c)(3) nonprofit organization for which you provide equal or greater consideration.

The following types of travel are not subject to the gift limit but must be reported on a statement of economic interests. Unlike payments for travel that need not be reported, these payments may disqualify the public official from participating in a future decision affecting the source of the travel.

- Giving a speech in the United States outside of California. Travel within the United States in connection with an event at which you give a speech, lodging, and subsistence limited to the day immediately preceding, the day of, and the day immediately following the speech, panel or similar service. 2 CCR § 18950.1(a).
- Travel in connection with a bona fide business. Travel payments made in connection with a business, trade or profession are considered salary or wages and should be reported as income received. 2 CCR § 18950.1(e).

- o Some travel not in connection with a speech. Travel not in connection with a speech, but reasonably related to a legislative, governmental, or public policy purpose and provided by either a government, an educational institution, a 501(c)(3) nonprofit organization, or a foreign organization that satisfies the requirements for 501(c)(3) status. 2 CCR § 189501.(b).

b. CONSTITUTIONAL PROHIBITION ON TRAVEL DISCOUNTS FOR OFFICERS

Article XII, section 7 of the California Constitution prohibits public officers (but not employees) from accepting free passes or discounts from transportation companies. This prohibition does not apply to a public officer's receipt of "frequent-flyer" miles earned without regard to official status.

5. LOANS

Personal loans received by elected and appointed officials are subject to restrictions and, in some circumstances, a personal loan that is not being repaid or is being repaid below certain amounts, may become a gift to the official who received it.

a. LIMITS ON LOANS FROM AGENCY OFFICIALS, CONSULTANTS AND CONTRACTORS

Elected officials and officials specified in Section 87200 may not receive a personal loan that exceeds \$250 from an officer, employee, member, or consultant of their government agency or an agency over which their agency exercises direction and control. In addition, such officials may not receive a personal loan that exceeds \$250 at any time from any individual or entity that has a contract with their government agency or an agency over which their agency exercises direction and control. Govt. Code §§ 87460-87462.

b. RESTRICTION ON LOAN TERMS

Elected officials may not receive a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include the names of the parties to the loan agreement, as well as the date, amount, interest rate, and term of the loan. The loan document must also include the date or dates when payments are due and the amount of the payments. Govt. Code § 87461.

i. EXCEPTIONS.

The following loans are not subject to these limits and documentation requirements:

- loans from banks or other financial institutions made in the normal course of business on terms available to members of the public without regard to official status;
- loans received by an elected officer's or candidate's campaign committee;
- loans received from your spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person unless he or she is acting as an agent or intermediary for another person not covered by this exemption;
- loans made or offered in writing prior to January 1, 1998. *Id.*

c. LOANS AS GIFTS

A personal loan received by any public official, including any designated employee, may become a gift and be subject to gift reporting and gift limitations:

i. LOAN WITH DEFINED REPAYMENT DATE

If the loan has a defined date or dates for repayment and has not been repaid, the loan will become a gift when the statute of limitations for filing an action for default has expired.

ii. LOAN WITHOUT A DEFINED REPAYMENT DATE

If the loan has not defined date or dates for repayment, the loan will become a gift if it remains unpaid when one year has elapsed from the later of:

- The date the loan was made;
- the date the last payment of \$100 or more was made on the loan; or
- the date upon which the official has made payments aggregating during the previous 12 months.

iii. EXCEPTIONS

The following loans will not become gifts to an official:

- a loan made to an elected officer's or candidate's campaign committee;
- a loan described above on which the creditor has taken reasonable action to collect the balance due;
- a loan described above on which the creditor, based on reasonable business considerations, has not undertaken collection action. However, except in a criminal action, the creditor has the burden

of proving that the decision not to take collection action was based on reasonable business considerations;

- a loan made to an official who has filed for bankruptcy and the loan is ultimately discharged in bankruptcy;
- a loan that would not be considered a gift, such as a loan from a family member. Govt. Code § 87462.

B. GIFTS TO THE CITY

Sometimes gifts are provided to City Departments or Agencies. The City imposes a number of requirements on the acceptance of gifts by departments. In addition, departments should follow state law guidelines on acceptance of gifts by agencies to ensure that gifts to the City are not attributed to individual public officials, who are subject to gift limits.

1. DEPARTMENTS MAY ACCEPT GIFTS OF UP TO \$10,000

Departments are authorized to accept gifts up to \$10,000 in value. For gifts in excess of this amount, the Board of Supervisors must accept the gift. Admin. Code § 10.100-305(b). Departments must report annually to the Board of Supervisors on the receipt and disposition of any gifts given to the department. Id.

2. GIFTS OVER \$100 MUST BE REPORTED

The Sunshine Ordinance requires that gifts to an agency to carry out any City function and in excess of \$100 in value must be reported on the Department's Web page and be disclosed in a public record. Admin. Code § 67.29-6. The report must include the donor's name, address, and telephone number, the value of the gift and any financial interest the donor has involving the City and County of San Francisco. A sample form for disclosure of this information is included in the Appendix to this volume.

3. STATE LAW REGULATIONS ON GIFTS TO GOVERNMENT AGENCIES

Under the California Political Reform Act, most public officials are prohibited from accepting gifts in excess of \$360 from a single source in a calendar year. In order to avoid gifts to a government being attributed to the public officials who may benefit from the gift, the Fair Political Practices Commission has issued a regulation for reporting gifts to the government. If a department complies with this reporting requirement, the gift will be presumed to be a gift to the department and not to the public officials who may benefit from it.

Under the gift to a government regulation, the department must:

- receive and control the use of the gift;
- use the gift for official agency business only;
- determine, in its sole discretion, who uses the gift – a donor may specify a purpose for the gift, but may not designate who may use it;
- record the gift in a memo, which confirms the requirements listed above, and also include identification of the donor, the person who will be using the gifts, a description of the official use and the nature and amount of the gift; and
- file the memo with the department's statements of economic interests within 30 days of receipt of the gift. 2 CCR § 18944.2.

4. GIFTS OF PASSES OR TICKETS GIVEN TO THE AGENCY

Gifts of passes or free admission to a sports facility, movie, parking, amusement park or similar events or places are gifts to the agency and not the official who uses them if any of the following apply:

a. GIVEN TO THE AGENCY

The tickets or passes are:

- given to the agency for the sole purpose of distributing them to officials of the agency and their spouses and immediate families;
- the agency so limits the use of the tickets or passes;
- the tickets or passes are not earmarked by the donor for any specific official of the agency; and
- the agency retains a written public record of the terms under which the tickets were accepted and distributed and to whom the tickets were distributed. 2 CCR § 18944.1(a).

b. PUBLICLY OWNED FACILITY

The tickets or passes are for an event at a publicly owned facility under the jurisdiction of the agency and neither the agency or any official receiving or distributing the tickets for the agency distributes the tickets or passes to anyone who is not an official of the agency or not the official's spouse or immediate family member. 2 CCR § 18944.1(b).

c. PART OF A CONTRACT

The tickets are distributed to the agency as part of the contract for the use of the facility and the distribution and use of the passes or tickets are regulated by an officially adopted policy of the agency. 2 CCR § 18944.1(c).

d. CEREMONIAL FUNCTION

The tickets or passes are provided to an official of the agency for use by the official and his or her spouse and immediate family because the official has a ceremonial role or function to perform on behalf of the agency. 2 CCR § 18944.1(e).

e. JOINT POWERS AGREEMENT

The tickets are provided to an agency or officials of the agency for use at an event at a publicly owned facility constructed or operated under a joint powers agreement and the agency is a party to the agreement and the distribution of the tickets is regulated by an officially adopted policy of the agency. 2 CCR § 18944.1(e).

V. OBLIGATIONS OF CITY OFFICERS AND EMPLOYEES

In addition to their responsibilities to comply with State and local ethics laws, local law charges City officers and employees with several obligations with respect to enforcement of local ethics laws.

A. COOPERATING AND ASSISTING IN ENFORCEMENT INVESTIGATIONS

Under section 3.240 of the Campaign and Governmental Conduct Code, in connection with an investigation by the Ethics Commission, District Attorney, or City Attorney of an alleged violation of Chapter 2 of the Campaign and Governmental Conduct Code, City officers and employees are:

- required to cooperate with and assist those agencies;
- prohibited from providing false or fraudulent evidence, documents, or information to those agencies; and
- prohibited from concealing from those agencies information that is material to an investigation.

B. PROHIBITION ON FILING FALSE CHARGES

Section 3.238 of the Campaign and Governmental Conduct Code prohibits all persons, including City officers and employees, from knowingly and intentionally filing with the Ethics Commission, the District Attorney, or the City Attorney any false charge alleging a violation of Article III, Chapter 2 of the Campaign and Governmental Conduct Code.

C. PROHIBITION ON AIDING AND ABETTING

Section 3.236 of the Campaign and Governmental Conduct Code prohibits any person, including City officers and employees, from knowingly and intentionally providing assistance or otherwise aiding and abetting any other person in violating Chapter 2 of the Campaign and Governmental Conduct Code.

VI. MASS MAILINGS AT PUBLIC EXPENSE

Government Code § 89001 provides that no newsletter or other mass mailing may be sent at public expense. A mass mailing is defined as more than 200 substantially similar pieces of mail. Govt. Code § 82041.5. Taken literally, the statute would preclude any large mailing at public expense, including many mailings essential to the operation of government, such as tax notices, sample ballots, and meeting agendas. To avoid this result, the Fair Political Practices Commission ("FPPC") has promulgated regulations to clarify which mass mailings are permissible and which are impermissible.

A. WHAT MASS MAILINGS ARE PROHIBITED?

Under the FPPC's regulations, 2 Cal. Code Regs. § 18901(a), a mass mailing is prohibited only if all of the following four requirements are met:

1. TRANSMISSION

The item is sent or delivered by any means to the recipient at his or her residence, place of employment or business, or post office box. The FPPC has interpreted the rule broadly, to apply to a range of modes of transmission, including fax and personal delivery as well as postal delivery. According to the FPPC, the rule applies only to the transmission of materials to the locations specified in the rule – to a person's home, office, or post office box.

2. REFERENCE TO ELECTED OFFICER

The item sent either:

- features an elected officer affiliated with the agency which produces or sends the mailing, or
- includes the name, officer, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

3. PAID FOR WITH PUBLIC FUNDS

A mass mailing is sent at public expense if:

- (a) any of the cost of distribution is paid for with public moneys; or
- (b) costs of design, production, and printing exceeding \$50 are paid with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

4. MORE THAN 200 PIECES SENT

The mass mailing rule applies only to mailings of more than 200 substantially similar items in a single calendar month. Copies that are exempt under 2 Cal. Code Regs. § 18901(b) are not counted towards the 200 limit. The following materials are exempt:

- **Letterhead.** Any item in which the elected official's name appears only in the letterhead or logotype of the stationery, forms (including "compliments of" cards), or envelopes,. Such an item may not include the elected official's picture, signature, or any other reference to the elected official, except as permitted by another exception. 2 CCR § 18901(b)(1).
- **Press Releases.** A press release sent to members of the media. 2 CCR § 18901(b)(2).
- **Inter-office communications.** Materials sent in the normal course of business to other governmental entities or officers. 2 CCR § 18901(b)(3).
- **Intra-office communications.** Materials sent in the normal course of business to staff. 2 CCR § 18901(b)(4).

- **Collection or payment of funds.** Any item sent in connection with the payment or collection of funds if use of the elected official's name, office, title, or signature "is necessary to the payment or collection." 2 CCR § 18901(b)(5).
- **Essential to administration of program.** Any item sent by an agency responsibly for administering a government program, or persons subject to that program, where the mailing is essential to the functioning of the program, the item does not include the elected official's photograph, and use of the elected official's name, office, title, or signature is necessary to the functioning of the program. 2 CCR § 18901(b)(6).
- **Required by law.** Any legal notice or item sent as required by law, court order, or order adopted by an administrative agency pursuant to the Administrative Procedure Act, and in which use of the elected officer's name, office, title, or signature is necessary. Inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name on a ballot argument, shall be considered necessary to such a notice or other item. 2 CCR § 18901(b)(7).
- **Directories.** A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the agency sending the mailing, where all names are the same type size, type face, and type color and no photographs are included. 2 CCR § 18901(b)(8).
- **Announcements.** An announcement of a meeting if:
 - it is sent to the elected officer's constituents and concerns a public meeting that is directly related to the elected officer's incumbent governmental duties, which is to be held by the elected officer, and which the elected officer intends to attend, or
 - it announces an official agency event or events for which the agency is providing use of its facilities or staff or other financial support.

The announcement may not include the officer's photograph or signature and may include only a single mention of the officer's

name, except as permitted elsewhere in this regulation. 2 CCR § 18901(b)(9).

- **Agendas.** An agenda required to be made available. 2 CCR § 18901(b)(10).
- **Business Card.** A business card which does not contain the elected officer's photograph or more than one mention of the elected officer's name. 2 CCR § 18901(b)(11).
- **Materials sent in response to unsolicited requests.** A request is unsolicited if it is not requested or induced by the elected officeholder or a third party acting at the behest of the officeholder. 2 CCR § 18901(c)(4).

VII. PENALTIES FOR VIOLATIONS OF ETHICS LAWS

A. THE POLITICAL REFORM ACT

Any person who knowingly or willfully violates the Political Reform Act is guilty of a misdemeanor, which is punishable by a fine of up to \$10,000. Govt. Code § 91000. A violation of the Act may also result in civil penalties of up to \$5000 and subject the individual to discipline by the official's agency. Govt. Code §§ 83116, 91005.5, 91003.5. For violations of the gift and honoraria provisions, the Fair Political Practices Commission may bring an action to recover three times the amount of the unlawful gift or honoraria. Govt. Code § 89521. Injunctive relief is also available. If a court determines that a violation of the Act occurred, a court may set aside any official action if it might not otherwise have been taken or approved. Govt. Code § 91003.

B. GOVERNMENT CODE SECTION 1090

A violation of Government Code section 1090 may subject a person to a fine of not more than \$1000 or imprisonment. In addition a person found to have violated section 1090 is forever disqualified from holding office in the State. Govt. Code § 1097. A contract made in violation of section 1090 is void and unenforceable. Govt. Code § 1092.

C. SAN FRANCISCO ETHICS LAWS

Knowing and willful violations of the ethics provisions of Chapter 2 of the Campaign and Governmental Conduct Code may subject a person to criminal penalties of up to \$10,000 per violation and/or a year in jail. A violation of Chapter 2 also may subject a person to civil or

administrative penalties in the amount of \$5,000 for each violation. C&GC Code § 3.242. Injunctive relief is also available.

In addition to these penalties, City officers are subject to suspension and removal for official misconduct. Charter § 15.105. Any person removed from office because of official misconduct is ineligible for election or appointment to City office or employment for a period of five years after removal. Charter § 15.105(d).

PART THREE: OVERVIEW OF PUBLIC RECORDS & PUBLIC MEETINGS LAWS

I. INTRODUCTION

This Part of the Good Government Legal Guide is intended to familiarize department heads, City personnel, and members of City boards and commissions with State and local laws governing the public's right of access to City records and meetings conducted by City boards and commissions. It is also intended to be a reference for department personnel, commissioners, and commission staff members who need practical answers to questions.

We address the four major laws that affect open government in San Francisco.¹⁴ The Public Records Act (Govt. Code Section 6250 *et seq.*) is the State law governing public access to the records of State and local agencies. The Ralph M. Brown Act (Govt. Code Section 54950 *et seq.*) is the State law governing the conduct and meetings of local governmental boards and commissions. The San Francisco Charter imposes additional requirements on the conduct of City boards, commissions and officials. Finally, the San Francisco Sunshine Ordinance (San Francisco Administrative Code Chapter 67) imposes additional requirements affecting both the public's access to records and the conduct of meetings of City boards and commissions.¹⁵ The Sunshine Ordinance refers to City boards, commissions and most other multi-member policy making and advisory bodies as "policy bodies."

In addition, we address the pertinent provisions of the federal Americans with Disabilities Act and additional provisions of the San Francisco Administrative Code as they relate to public records and public meeting laws.

¹⁴ For the convenience of the reader, this overview refers to a number of statutory provisions. These citations are not intended to be exhaustive and are not the only sources of legal authority regarding public records and open meeting issues. Court cases, opinions of the Attorney General and City Attorney, and other sources of federal, state and local law may be relevant to a particular situation. Please contact the deputy city attorney advising your department if you have questions regarding topics covered in this overview.

¹⁵ The Community College District, the Redevelopment Agency, the San Francisco County Transportation Authority, the San Francisco Health Authority, the San Francisco Housing Authority, the San Francisco In-Home Supportive Services Public Authority, the San Francisco Local Agency Formation Commission, the San Francisco Parking Authority, the San Francisco Unified School District, and the Treasure Island Development Authority are separate legal entities subject only to the Public Records Act, the Brown Act (or other similar open meeting law) and, in some cases, other State laws governing public meetings and public records specific to the agency. They are not required to follow the Sunshine Ordinance, although some of these agencies have chosen to follow some or all of its requirements.

Because the majority of City agencies, commissions, and boards must comply with the Sunshine Ordinance, we do not differentiate between it and the State laws. Where State and local laws differ, we generally explain only the more rigorous standard.

In November 2004, California voters adopted Proposition 59, an amendment to Article I, section 3 of the California Constitution. Proposition 59 creates a general constitutional right of access to public records and meetings. But it also states that it does not repeal or nullify existing statutory or constitutional restrictions on access to public records and meetings and does not supersede or modify the right of privacy recognized in the California Constitution. It is unclear what impact Proposition 59 will have on access to public records and meetings, particularly in San Francisco, where the Sunshine Ordinance already provides for greater openness in government than State law requires.

The underlying policy of the public records and open meeting laws is that access to information concerning the conduct of the government's business is a fundamental right of each citizen. The purpose of the open meeting laws is to ensure that decisions made by policy bodies are made openly and with the public's participation.

All policy body members and department personnel are strongly encouraged to contact the Office of the City Attorney whenever questions regarding public records or public meetings arise. Violations of these laws are far more likely to occur from ignorance of the law than from deliberate intent. Even unwitting violations, however, are often viewed with suspicion. They invite criticism and undermine the credibility of City departments and policy bodies. As described more fully in Section V, there can be substantial penalties for violating these laws.

II. PUBLIC RECORDS AND INFORMATION LAWS

The premise of both the Public Records Act and the Sunshine Ordinance is that all records in the possession of government are public property. Absent some specific and limited exceptions, City agencies must make those records available for the public to inspect. This section will outline the disclosure requirements and procedures mandated by the Public Records Act and the Sunshine Ordinance.

A. WHAT IS A PUBLIC RECORD?

The Public Records Act defines a "public record" broadly to include "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency, regardless of the physical form or characteristics." Govt. Code § 6252(e). The Sunshine Ordinance defines "public information" as the content of "public records" as defined in the Public Records Act. Admin. Code § 67.20(b). If a docu-

ment meeting the statutory definition is in the possession of a City department or agency, the document is a “public record” whether or not it may be withheld from public disclosure.

A “writing” does not have to be in written form to be a public record. A public record may consist of any medium that contains encoded information in the possession of a City department, such as a computer tape, video recording, cassette recording or movie. Govt. Code § 6252(f). Should there be questions regarding public access to computer, video and other media, please consult the Office of the City Attorney.

The Public Records Act and Sunshine Ordinance require the City to disclose any identifiable record in its possession. The Sunshine Ordinance requires the City to make information available to a member of the public in any form requested so long as the information is available to or easily generated by the department in that form, including disk, tape, print-out or on a computer monitor. Admin. Code § 67.21(l). With limited exceptions, a department does not have to reprogram a computer, change the format of existing documents, or create a document not already in existence. Admin. Code § 67.21(l).

B. RESPONDING TO A PUBLIC RECORDS REQUEST

The following are guidelines to assist City officials in responding to public record requests.

1. PROPER REQUEST

A record request must specify the particular document or identifiable category of documents sought. The law does not give the requester the right to look through the files of an agency. A request may not properly ask to inspect “all of your records.” The Sunshine Ordinance does not require a department to reply to a series of written questions or interrogatories. The department should, however, provide documents to the requester that are responsive to the written questions.

A request need not be in writing to be a lawful request. The Sunshine Ordinance specifies that a request may be made orally or in writing by fax, postal delivery or email. Admin. Code § 67.21(b). A department is required to honor oral requests for records. The department may, however, ask for a request in writing to clarify the request or to facilitate a complete response.

2. ASSISTANCE TO REQUESTER TO IDENTIFY RECORDS

The Sunshine Ordinance requires City employees to assist members of the public in identifying the existence, form and nature of records or information maintained by, available to, or in the custody of the City. The California Public Records Act requires the Department to describe the physical location in which the requested records exist and to

provide suggestions for overcoming any practical basis for denying access to the records or information sought. These requirements are deemed satisfied if the Department is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records. Govt. Code § 6253.1(a) and (b); Admin. Code § 67.21(c).

An individual may request that a department provide information regarding the existence and form of records. The department must provide the individual with a written statement describing the existence, quantity, form and nature of records relating to a particular subject area within seven days after receiving the request. Admin. Code § 67.21(c).

The City's general duty to assist the requester does not entitle a department to require the requester to state his or her reason for making the request or the use to which the record will be put. Departments should not routinely make such inquiries. In some instances, particularly where the scope of the request is very broad or unclear, it may be appropriate to inquire as to the objectives of the requester where the inquiry would enable the department to identify the records and satisfy the request. Admin. Code § 67.25(c).

3. TIMELY RESPONSE

Both the Public Records Act and the Sunshine Ordinance require the City to respond to a record request promptly.

a. STANDARD REQUESTS

Unless made as an "Immediate Disclosure Request" (see directly below), a department must respond to a request to inspect or copy records within ten calendar days. In "unusual circumstances," however, an agency may have up to fourteen additional calendar days to respond. The head of the agency or her designee must inform the requester in writing of the extension within the initial ten-day period. The notice must set forth the reasons for the extension and the date on which a response will be made. Govt. Code § 6253(c).

"Unusual circumstances" permitting the extension are limited to the need to: (a) search for and collect the requested records from facilities separate from the office processing the request; (b) search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request; and/or (c) consult with another component of the agency or with another agency that has a substantial interest in the response to the request. Govt. Code § 6253(c).

Although departments have ten days to respond, departments should respond as promptly as is reasonably possible. Admin. Code § 67.21(a).

b. IMMEDIATE DISCLOSURE REQUESTS

The Sunshine Ordinance requires a faster response for “Immediate Disclosure Requests.” This timeline applies only if the request is in writing and the words “Immediate Disclosure Request” are placed across the top of the request and on the envelope, subject line or cover sheet in or with which the request is transmitted. Such requests must be satisfied no later than the close of business the next day. The department should respond to the requester within that time period by fax or email, if the requester has provided that information to the department. If the requester has provided a postal address only, mailing the response within the time period satisfies the requirement of the Sunshine Ordinance. Admin. Code § 67.25(a).

A department may invoke the extension of no more than fourteen calendar days to respond to “immediate disclosure requests,” but only on the following grounds: (a) the voluminous nature of the information requested; (b) its location in a remote storage facility; and/or (c) the need to consult with another interested department. If the City is invoking the fourteen-day extension, the City must notify the requester by the close of business on the business day following the request. Govt. Code § 6253(c); Admin. Code § 67.25(b).¹⁶

c. DUTY TO PRODUCE RECORDS INCREMENTALLY WHEN REQUESTED

The Sunshine Ordinance requires a department to produce records as soon as possible on an incremental or “rolling” basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, a department must produce records as they are located and reviewed rather than waiting until all potentially responsive documents have been reviewed and collected. Admin. Code § 67.25(d).

4. PROPER RESPONSE

Within the original or extended time period, the department must either (a) locate and disclose the document; (b) inform the requester in writing that it has no document responsive to the request; or (c) inform the requester in writing that the record exists, it is

¹⁶ Administrative Code section 67.25(b) permits “an extension of 10 days as provided in Government Code Section 6456.1....” The reference to section 6456.1 is a mistaken reference to section 6256.1, which addressed extensions of time to respond to public records requests. Effective January 1, 1999, the Legislature repealed Government Code section 6256.1 and added Government Code Section 6253(c). Section 6253(c) contains the text of former section 6256.1, with one amendment. Former section 6256.1 permitted an extension of not more than “10 working days”; section 6253(c) permits an extension of not more than “14 days.” The apparent intent of the Sunshine Ordinance was to permit the same extension afforded by State law. Accordingly, we have concluded that a department may extend its time to respond for 14 additional calendar days. As a practical matter, the difference between 10 working days and 14 calendar days is likely to be minimal.

exempt from disclosure, and the legal and factual grounds for the exemption. Govt. Code § 6253; Admin. Code §§ 67.21(b), 67.27. It is unlawful for a department to simply refuse to respond to a request for documents. Failure to respond could be deemed official misconduct and subject the employee to discipline. In addition, it could lead to a legal action in which the requester could recover attorneys' fees against the City.

Although the department must respond in a timely fashion to a public records request, the right to inspect a public record does not include the right to demand that a department cease its operations to respond to a request for a large number of documents. The response to the request must be reasonable. If, for example, the request encompasses numerous documents, a department need not put the rest of its work aside to respond to the request. Instead, it may afford the requester access to documents in an incremental fashion by providing the requester access to documents for a specified amount of time each day. The department may oversee the inspection of records in a file to ensure that the requester does not disturb the file.

If the department has no record(s) that meet the specific request, the department has no duty to create one (or to reprogram a computer to create one). However, the department must provide the requester with information about records that exist that are similar to or contain some of the information that is requested and provide those records if the requester so desires. In addition, a department must print out a responsive document if it has the information in a computer database that can be easily extracted into a report or other document. Admin. Code § 67.21(l). The department must inform the requester if another department or City employee possesses records responsive to the request. Admin. Code §§ 67.25(c) and 67.27(d).

5. FEES

a. NO FEES FOR RECORDS SEARCH

The department may not charge any fees to cover the time and costs incurred in searching for, locating or collecting records to respond to a public records request. Admin. Code § 67.26.

b. NO FEES FOR REDACTING EXEMPT INFORMATION

The department may not charge a fee to cover the time and costs incurred in redacting exempt information from a record to be disclosed in response to a public records request. Admin. Code § 67.26.

c. NO FEES FOR INSPECTING RECORDS

The department may not charge any fees for a requester to inspect records. Admin. Code § 67.28(a). In some circumstances, a department may choose to have staff sit with the requester while he or she inspects records. The department may not charge a fee for this use of staff time.

d. FEES FOR COPIES

The department may charge a fee for the duplication and mailing of copies of records. For routinely produced documents, such as copies of an agenda, the Sunshine Ordinance allows the City to charge 1¢ per page, plus postage. For documents assembled and copied to the order of the requester, a department may charge no more than 10¢ per page. Admin. Code § 67.28 (b),(c). A department may establish higher fees only if it prepares and posts an itemized cost analysis establishing that the per page direct cost exceeds the above amounts. Details regarding cost analysis calculations may be found in the Sunshine Ordinance. Admin. Code § 67.28(d).

Where the member of the public requests a copy of a record on a medium other than paper, the City may charge for the cost of the medium on which the information is duplicated. Admin. Code § 67.21(l). A department may charge up to \$10 for video copies of video recorded meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

e. FEES FOR OTHER SERVICES

A department may charge for services other than duplicating, such as providing certified copies of documents. Please contact the Office of the City Attorney if you have questions regarding conflicts between fees authorized by the Sunshine Ordinance and fees authorized by State law or other ordinances.

C. EXEMPTIONS FROM DISCLOSURE

The Public Records Act provides that certain classes of records are exempt from disclosure. In many cases, the Sunshine Ordinance limits the City's ability to claim a State law exemption. Interpreting these exemptions presents complex legal and factual questions. The burden is always on the department to justify its refusal to disclose a document. When declining to disclose a document, the department must specify the legal basis for its refusal and be prepared to support the refusal with a factual justification. Admin. Code § 67.27.

This section is intended generally to alert public officials to the most common exemptions. It is infeasible to list all the exemptions available under State and federal law. Many apply to specialized types of records. Some of the more familiar exemptions stem from the Public Records Act itself. Many exemptions derived from other State laws are alphabetically catalogued at the end of the Public Records Act. Govt. Code §§ 6276.02-6276.48. This alphabetical list does not include all exemptions. Govt. Code § 6275.

The exempt status of a record generally means that a department cannot be compelled to disclose it; in many cases, the department may still voluntarily choose to do so. With some exceptions, the Public Records Act generally does not prohibit the disclosure of exempt records; the Act typically sets a minimum right of public access to records that the City must provide. However, federal and State laws protect the confidentiality of certain records. For example, where disclosure of information would violate the right to privacy protected by the California Constitution or a specific statute prohibiting disclosure, the City may not disclose the information. (See, for example, Welfare and Institutions Code § 10850, making confidential records that concern individuals who receive certain public social services.)¹⁷

If there is a question whether a record or category of records is exempt, the Office of the City Attorney should be consulted promptly so that the response deadline can be met.

1. EXEMPT FROM DISCLOSURE UNDER OTHER STATE OR FEDERAL LAWS

Certain documents may be exempt because the United States Constitution, the California Constitution, or other federal or State laws prohibit their disclosure. For example, certain records may be exempt from disclosure because they reveal confidential or personal information regarding individuals and such disclosure would constitute an unwarranted invasion of personal privacy. If disclosure would violate the federal or State constitution or violate some other federal or State law prohibiting the disclosure of the information, the department may not release the document. Govt. Code § 6254(k).

2. PERSONNEL, MEDICAL OR SIMILAR FILES

The department may decline to disclose personnel, medical or similar files, “the disclosure of which would constitute an unwarranted invasion of personal privacy.” Govt. Code § 6254(c).

¹⁷ Individual employees lack the authority to disclose privileged records. Such decisions must be made by department heads or the policy body that oversees the department. Unauthorized disclosure of a privileged document is official misconduct and may subject the person who made the disclosure to disciplinary action or criminal prosecution, or both. C&GC Code §§ 3.228, 3.242.

All personnel records, however, are not automatically exempt. For example, members of the public are entitled to see records that contain an employee's name, job classification, current assignment, and actual wages earned including overtime. The City must also disclose the amount, basis or recipient of any performance-based increase in compensation, benefits and/or bonus awarded to any employee. Admin. Code § 67.24(c).

The Sunshine Ordinance also mandates disclosure of the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code § 67.24(c). Because of employees' right to privacy, home addresses, telephone numbers, social security numbers, ages, ethnicity and marital status should not be disclosed. In addition, the Sunshine Ordinance requires the City to disclose records of confirmed misconduct. Admin. Code § 67.24(c)(7). This provision is consistent with the City's policy that, absent overriding constitutional or statutory authority, the City discloses records of confirmed misconduct. Please contact the Office of the City Attorney for further assistance.

3. PENDING LITIGATION

A department is not required to disclose records relating to and developed during pending litigation to which the City is a party, until the pending litigation is finally adjudicated or otherwise settled. Govt. Code § 6254(b). Claims filed against the City must be disclosed. Similarly, the Sunshine Ordinance prohibits the City from entering into confidential settlements. Admin. Code § 67.12(b)(3). If you receive a request to inspect records relating to pending litigation, please contact the deputy city attorney handling the litigation immediately.

4. ATTORNEY-CLIENT COMMUNICATION

A department may decline to disclose any attorney-client privileged memoranda sent between the department and its attorneys. Govt. Code § 6254(k). The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any "San Francisco governmental ethics code," or the Sunshine Ordinance. At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. State law makes communications between the City Attorney and those officials privileged and confidential. Evidence Code § 950 *et seq.* There may be cases where public disclosure of an attorney-client communication may conflict with the Charter and State law. Requests for attorney-client communications should be referred to the Office of the City Attorney.

5. INFORMANTS, COMPLAINANTS, AND WHISTLEBLOWERS

In some circumstances, the identity of persons complaining to the City about illegal acts may be shielded from public disclosure. Evidence Code § 1041. In addition, the identity of whistleblowers complaining about wasteful, inefficient, or improper activities or misuse of City funds by City officers and employees may be protected from disclosure. Charter §§ C3.699-13 and F1.107; C&GC Code § 4.120. Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of persons complaining to City officials.

6. TRADE SECRETS

Under certain circumstances, the law protects trade secrets from disclosure. Civil Code §§ 3426, 3426.7(c); Evidence Code § 1061. Different types of information, including proprietary financial data, may constitute a trade secret.

D. DOCUMENTS CONTAINING EXEMPT AND NON-EXEMPT INFORMATION

Some records contain both exempt and non-exempt information. Under the Sunshine Ordinance, a department may not withhold a document in its entirety unless all the information in it is exempt. The responding department must redact the exempted material and annotate the redacted text by referring to the specific provision of the Public Records Act, Sunshine Ordinance or other law authorizing the refusal to disclose. The department may not charge the requester a fee for redacting the information. Admin. Code § 67.26.

E. SUNSHINE ORDINANCE LIMITATIONS ON EXEMPTIONS

The Sunshine Ordinance limits the ability of City departments to invoke certain exemptions available under the Public Records Act.

1. INTEREST IN NON-DISCLOSURE OUTWEIGHS INTEREST IN DISCLOSURE

In addition to the specific exemptions enumerated in the Public Records Act, the act provides a general exemption. This exemption allows the government agency to refuse to disclose records where, on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. The Sunshine Ordinance does not permit a department to decline to disclose documents under this exemption. Admin. Code § 67.24(g).

2. DELIBERATIVE PROCESS

Under the Public Records Act, an agency may also decline to disclose documents under the “deliberative process privilege.” The deliberative process privilege applies where the agency can demonstrate that the disclosure of the documents would discourage candid discussion within the agency and thereby undermine the agency’s decision making process and its ability to perform its functions. The Sunshine Ordinance prohibits the City from invoking this exemption. Admin. Code § 67.24(h).

F. CONTRACTS, BIDS, REQUESTS FOR PROPOSALS

The Sunshine Ordinance affords the public greater rights to inspect contracts and other contract-related materials than does State law.

1. CONTRACTS OTHER THAN SOLE SOURCE SERVICE CONTRACTS, LEASES OR PERMITS AND FRANCHISE AGREEMENTS

Contracts, contractors’ bids, responses to requests for proposals, and all records of communications between departments and persons or firms seeking contracts must be available for public inspection immediately after a contract is awarded. Departments may refuse to disclose documents containing information regarding an unsuccessful bidder’s net worth and other proprietary financial information. City agencies must inform bidders and contractors that all financial information provided by a successful contractor will be disclosed after the contract is awarded. Admin. Code § 67.24(e)(1).

Except for sole source service contracts, certain leases or permits and franchise agreements, the City may refuse to disclose draft versions of contracts during the negotiating process. These drafts must be preserved and made available for public inspection ten days prior to the presentation of the agreement to the board or commission for its approval, unless the City can demonstrate that the public interest would be “unavoidably and substantially” harmed if the drafts were released. Admin. Code § 67.24(a).

2. SOLE SOURCE SERVICE CONTRACTS, LEASES AND FRANCHISE AGREEMENTS

Documents exchanged and related to the positions of the parties, including drafts, must be made available immediately to the public upon request during the course of negotiations for: (1) personal, professional, or other contractual services not subject to a competitive process or where such process has arrived at a stage where there is only one qualified responsive bidder; (2) leases or permits having total anticipated revenue or expense to the City of \$500,000 or more or a term of 10 years or more; and (3) franchise agreements. If no records of the negotiations are prepared or exchanged or the records do not provide a meaningful representation of the respective positions, upon request, the

City Attorney or City representative familiar with the negotiations must prepare a written summary of the “respective positions” of the parties in the negotiations. The summary must be prepared within five business days of the final negotiations for the week. Admin. Code § 67.24(e)(3).

3. GENERAL REQUIREMENTS THAT APPLY TO ALL CONTRACTS

a. FINANCIAL DATA

The City may withhold proprietary financial data until the final approval authority in the City awards the contract. The City must make proprietary financial information about the winning bidder public upon award of the contract, unless other State or federal law prohibits such disclosure. Admin. Code § 67.24(e). In some cases (for example, under the federal Transportation Regulations for Disadvantaged Business Enterprises), the City is prohibited from disclosing the personal net worth and related documents of successful bidders. City departments must inform bidders and contractors that all financial information provided by the successful contractor will be disclosed after the contract has been awarded. Admin. Code § 67.24(e). Please contact the Office of the City Attorney for additional guidance.

b. DOCUMENTS RELATING TO FORMULATION OF NEGOTIATION STRATEGY

The City may withhold from disclosure preliminary drafts and memoranda containing recommendations relating to the formulation of the City’s negotiating strategy that have not been provided to a third party. The factual content of such documents is subject to disclosure upon request. Admin. Code § 67.24(a).

c. OTHER SPECIFIC EXEMPTIONS

A department is not required to disclose contract-related documents that are protected by federal or State law or fall within specific exemptions permitted under the Public Records Act and Sunshine Ordinance. For example, documents that are protected by the attorney-client privilege or attorney work product privilege are not subject to public disclosure.

d. REQUESTS FOR PROPOSALS

The Sunshine Ordinance contains specific disclosure requirements for documents relating to requests for proposals (“RFP”). After completion of any review, evaluation or rating of responses to an RFP, if requested, a department must disclose the names of scorers and evaluators, with their individual ratings, comments and score sheets, and other materials reflecting the selection panel’s evaluation. The department need not disclose responses to an RFP or records of communications between the depart-

ment and proposers until after a contract has been awarded. After a contract has been awarded, the department must also, if requested, disclose the net worth or other proprietary financial data submitted by the person or firm awarded the contract, unless other State or federal law prohibits such disclosure. Admin. Code § 67.24(e)(1). See Section F.1 above regarding the non-disclosure of proprietary financial data of unsuccessful bidders. RFP selection panels continue to be closed to the public.

G. PROVIDING ORAL INFORMATION, MAINTAINING A PUBLIC REVIEW FILE AND PROTECTING EMPLOYEES' RIGHT TO EXPRESS PERSONAL OPINIONS

1. ORAL PUBLIC INFORMATION

Under the Sunshine Ordinance, each department head must designate a knowledgeable person or persons who can answer questions regarding departmental operations, plans, policies and positions. That person must respond to inquiries, provided that no more than fifteen minutes is required to obtain the information responsive to the inquiry. The department head should designate more than one person, so that someone is always available to perform this duty. Admin. Code § 67.22.

2. PUBLIC REVIEW FILE

The Sunshine Ordinance requires the Clerk of the Board of Supervisors and the clerk or secretary of each board and commission enumerated in the Charter to maintain a public review file. The file must be accessible to the public during normal business hours. The public review file must contain copies of communications distributed to or received from a quorum of the board or commission concerning any matter calendared by the body within the previous thirty days or likely to be calendared within the next thirty days. This requirement does not apply to exempt materials. Admin. Code § 67.23.

The file must be maintained in chronological order for communications received in the immediately preceding three business days. After the document has been on file for two days, it may be removed and placed in the monthly chronological file. The clerk need not put lengthy, multiple page reports that are attached to these communications in the chronological file, as long as the memorandum of transmittal is included. Admin. Code § 67.23.

3. EMPLOYEES' RIGHTS TO EXPRESS OPINIONS

The Sunshine Ordinance addresses personal communications by City employees. It explicitly states that public employees have a right when off duty to express their personal opinions on any matter of public concern. Of course, public employees may not repre-

sent that their opinions are those of the department or misrepresent a department's opinion. In addition, an employee has no right to engage in off-duty speech that could undermine the employee's ability to do his or her job or the capacity of the department to function. Admin. Code § 67.22(d). Before curtailing off-duty speech activities of an employee, a department representative must consult the Office of the City Attorney.

H. DUTY TO PREPARE ANNUAL REPORTS AND FILE WITH THE PUBLIC LIBRARY

The Charter provides that each board and commission of the City shall be required by ordinance to prepare an annual report describing its activities, and shall file such report with the Mayor and the Clerk of the Board of Supervisors. Charter § 4.103. Boards, commissions or departments that produce an annual report must: (i) post the report on the City's Web site and transmit the URL to the Public Library within 10 days of final approval, (ii) provide a copy printed from the Web site upon request, and (iii) obtain prior approval from the Board of Supervisors to expend City funds to procure printing of the report. Admin. Code §§ 1.56, 8.16.

III. RECORDS RETENTION AND DESTRUCTION LAWS

City, state and federal laws contain many provisions relating to the retention and destruction of records. Some of the most important requirements are summarized below. Department heads should familiarize themselves with the requirements contained in Chapter 8 of the San Francisco Administrative Code and the Sunshine Ordinance, as well as rules relating to particular documents in the department's possession.

The purpose of the records classification and retention law is to ensure that important records are preserved in an orderly fashion. Proper retention of records is necessary to ensure that the legal and financial rights of the City and its residents are protected. In addition, a carefully considered policy obviates the need of a department to retain unnecessary paper. Accordingly, each department head must develop a written policy specifically outlining which records must be maintained and for how long.

A. DUTIES FOR DEPARTMENT HEADS

The Sunshine Ordinance imposes certain duties on department heads.

1. MAINTAINING AND PRESERVING RECORDS

The Sunshine Ordinance requires the Mayor and all department heads to maintain and preserve all documents and correspondence in a professional and businesslike manner.

Admin. Code § 67.29-7(a). Institution of and compliance with a department's records classification and retention policy satisfies this requirement.

The Sunshine Ordinance also provides that documents prepared, received or maintained by the Office of the Mayor, elected officials or department heads are the property of San Francisco. The originals must be retained in the City, even after the official leaves the office, pursuant to record retention policies. Admin. Code § 67.29-1.

2. DEPARTMENT HEAD CALENDARS

The Sunshine Ordinance requires the Mayor, City Attorney and department heads to keep and maintain a daily calendar. City officials must record the time and place of each meeting or event attended, excluding purely personal or social events at which no City business is discussed. For meetings that are not otherwise publicly recorded, the calendar must include a general statement of the issues discussed. The Ordinance does not state that the official must include on the calendar the names of individuals attending the meeting. Admin. Code § 67.29-5. Calendars must be available to any requester three business days subsequent to the calendar entry date. The official is not required to disclose calendars in advance of the calendar entry date. Admin. Code § 67.29-5.

3. MAINTENANCE OF LIST OF SOLE SOURCE CONTRACTS

The Sunshine Ordinance requires each department, at the end of each fiscal year, to provide to the Board of Supervisors a list of all sole source contracts the department entered into during the past fiscal year. The department must make this list available to the public. Admin. Code § 67.24(e)(3).

4. DUTY TO COOPERATE WITH CITY ADMINISTRATOR IN COMPILING CITY INDEX

The Sunshine Ordinance requires the City Administrator to compile an index that identifies the types of information and documents the City's departments, agencies, boards, commissions, and elected officials maintain. Each department, commission, and public official must cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity, those documents it receives in the ordinary course of business and the types of requests that it regularly receives. Admin. Code § 67.29.

5. DUTY TO MAINTAIN A WEB SITE

Each department must maintain a Web site. Admin. Code § 67.29-2. Please see Section IV.C.6 of this Part Three below, "Maintaining a Web Site," for more information.

B. RECORDS DEFINED

For the purpose of records retention, the term “records” is defined more narrowly than in the Public Records Act or Sunshine Ordinance. “Records” include any paper, book, photograph, film, sound recording, map, drawing or other document, or any copy thereof, made or received by the department in connection with the transaction of public business and retained by the department: (1) as evidence of the department’s activities; (2) for the information contained in it; or (3) to protect the legal or financial rights of the City or of persons directly affected by the activities of the City. Admin. Code § 8.1.

A number of documents do not fall within the definition of “records” for records retention purposes. These documents may be destroyed when they are no longer of use. Phone message slips, notes of meetings, and research notes prepared for the personal use of the employee creating them may be destroyed immediately. E-mail that does not fall within the definition of “record” for purposes of records retention (see definition directly above) may be destroyed immediately. Similarly, periodicals or publications received by a department that are not of historical significance may be destroyed. Duplicate copies of documents may be destroyed provided that the appropriate City department has retained the original. Govt. Code § 34090.7. With one exception, drafts of documents that have been superseded by later drafts or a final version need not be retained. Drafts of agreements City representatives are negotiating with another party that have been exchanged with that party must be retained for public review prior to approval by the department commission or board. Admin. Code § 67.24(a)(2).

C. E-MAIL

Any e-mail that is created or received in connection with the transaction of public business and which (1) the department retains as evidence of the department’s activities, or (2) relates to the legal or financial rights of the City or of persons directly affected by the activities of the City, must be retained in accordance with the department’s records retention schedule. The standard for determining if e-mail is a record that must be retained is identical to the standard that applies to any document. Govt. Code § 6252(e); Admin. Code § 67.20(b). If the e-mail must be retained, it should be printed out and the hard copy retained in the appropriate file unless the department can reliably retain and retrieve the e-mail in electronic format.

D. CLASSIFICATION OF RECORDS

All documents falling within the definition of “records,” described above, must be divided into three classifications. Admin. Code §§ 8.3 and 8.4.

1. CURRENT RECORDS

Records that for convenience, ready reference, or other reason are retained in the office space and equipment of the department involved.

2. STORAGE RECORDS

Records which need not be retained in the office space and equipment of the department, but which must be, or should be, prudently preserved for a time or permanently in the facilities of a records center.

3. PERMANENT RECORDS

Records required by law to be permanently retained. Unless otherwise required by law or regulation, permanent records shall be stored by microfilming the paper records or placing them on an optical imaging storage system, placing the original film or tape in a State-approved storage vault and delivering a copy to the department. The paper records may then be destroyed.

In addition, each department must designate its "Essential Records": records essential to the continuity of government and the protection of rights and interests of individuals in the event of a major disaster. The public interest demands that Essential Records be preserved against possible destruction by fire, earthquake, flood, enemy attack or other cause.

E. RETENTION AND DESTRUCTION OF RECORDS

The department head must prepare a schedule for the systematic retention and destruction of its records. Admin. Code § 8.3. State law requires all records subject to records retention requirements to be maintained for at least 2 years. Govt. Code § 34090.

- **Current Records and Storage Records over 5 years old** may be destroyed if they have served their purpose and are no longer required for any public business or other public purpose. However, records pertaining to financial matters may be destroyed only after approval by the Controller; those having legal significance only after approval by the City Attorney; and payroll checks, time cards and related documents only after approval by the Retirement Board. If requested by the Retirement Board, payroll checks, time cards and related documents must be delivered to the Retirement Board instead of being destroyed. Admin. Code § 8.3.
- **Current Records and Storage Records more than two but less than five years old** may be destroyed or otherwise disposed of under the following conditions: (1) if their

destruction will not be detrimental to the City and County or defeat any public purpose; and (2) if a definitive description of such records and the retention period applicable to them are set forth in a records retention schedule that is prepared by the department head, approved by the Mayor or his designee or the board or commission concerned, and approved by the City Attorney as to records of legal significance, by the Controller as to records relating to financial matters, by the Retirement Board as to time rolls, time cards, payroll checks and related matters. Admin. Code § 8.3.

- **Permanent Records and Essential Records** may not be destroyed. Paper records may be destroyed, however, if the records have been microfilmed or placed on an optical imaging storage system. Admin. Code § 8.4. Under the Sunshine Ordinance, tapes of meetings of boards and commissions enumerated in the Charter must be classified as permanent records. Admin. Code § 67.14(b).

IV. PUBLIC MEETING LAWS

A. WHO IS SUBJECT TO PUBLIC MEETING LAWS?

1. LEGISLATIVE OR POLICY BODIES

The Brown Act applies to “legislative bodies.” Briefly, the Brown Act defines a legislative body as any local government board, commission, committee, whether permanent or temporary, decision making or advisory, created by charter, ordinance, resolution or formal action of a legislative body. Govt. Code § 54952. The Sunshine Ordinance applies to “policy bodies.” “Policy bodies” include all of the City’s boards and commissions, any advisory body created by the initiative of a board, commission, or other policy body, any standing committee of a policy body and any advisory board, commission, committee or council created by federal, state or local grant whose members are appointed by City Officials, employees or their agents. Committees consisting solely of City employees and/or officials that are created by Charter, ordinance, resolution or formal action of a policy body are policy bodies subject to the provisions of the Brown Act and Sunshine Ordinance. Govt. Code § 54952(b); Admin. Code § 67.3(d). In this discussion of open meeting laws, the term “policy body” encompasses legislative bodies as well.

2. PASSIVE MEETING BODIES

The Sunshine Ordinance goes beyond the Brown Act by requiring certain gatherings that are not subject to the formal requirements of the Brown Act or Sunshine Ordinance comply with “passive meeting” rules.

a. PASSIVE MEETING GATHERING

The following are the types of groups or gatherings subject to passive meeting rules. First, meetings of advisory committees or other multimember bodies created in writing, or by the initiative of, or otherwise primarily formed or existing to serve as a non-governmental advisor to a member of a policy body, the Mayor, the City Administrator, a department head or any elective officer are subject to the passive meeting rules. Admin. Code § 67.3(c)(1), (2). Where a City official does not form such a committee, generally the committee's meetings with City officials will not be subject to passive meeting rules. In addition, the Sunshine Ordinance recognizes privacy rights of individuals and entities. As a result there may be cases where the Ordinance may not be interpreted to require public access to such meetings.

Second, social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited are subject to the passive meeting rules. Admin. Code § 67.3(c)(3).

Third, portions of meetings of the governing board of an entity that owns, operates or manages any property in which the City has or will have an ownership interest and on which the entity performs a governmental function relating to the furtherance of health, safety or welfare are subject to the passive meeting rules. Only the portions of the meeting that address any matter relating to the property, the government-related activities on the property, or the performance under the City contract or grant must comply with the passive meeting rules. The City's contract with the entity must contain a provision requiring the entity to comply with the passive meeting rules. The Sunshine Ordinance requires that the entity's records relating to the government-related activities be made available to the public. Admin. Code § 67.4(b).

Fourth, committees created by the initiative of a member of a policy body, the Mayor, or a department head, consisting solely of City employees, that are reviewing, developing, modifying, or creating City policies or procedures relating to public health, safety, welfare or relating to services for the homeless are subject to the passive meeting provisions. Admin. Code § 67.3(c)(5). All other committees consisting solely of City employees that are created by the initiative of a member of a policy body, the Mayor or a department head are not subject to the passive meeting rules.¹⁸ Admin. Code § 67.3(c)(4).

¹⁸ As noted above, any committee of employees that is formed by Charter, ordinance, resolution, or formal action of a policy body is subject to the requirements of the Brown Act and Sunshine Ordinance.

b. PASSIVE MEETING RULES

Under the passive meeting rules, the gatherings or meetings must be open to the public. Bodies holding “passive meetings” need not formally notice such meetings, except on the City’s Web site whenever possible. Nor must the body prepare an agenda. Upon request, an agency must disclose the time, place, and nature of the meeting and event, as well as any agenda prepared. Passive meeting bodies are not required to take public comment. Admin. Code § 67.4(a).

3. EXECUTIVE OFFICIALS

Neither the Brown Act nor the Sunshine Ordinance applies to executive officials, even those serving under boards and commissions. As described in Section VI below, Charter section 16.112 may require certain department heads to hold public hearings when taking actions specified in that section.

4. PRIVATE ENTITIES

In certain circumstances, private entities that engage in the City’s business or contract with the City may be required to permit the public access to its meetings. Please see Section IX for more information.

B. WHAT IS A MEETING?

The Brown Act and Sunshine Ordinance apply to all “meetings” of policy bodies. With limited exceptions, under the more expansive language of the Sunshine Ordinance, a meeting occurs whenever a majority of the members of a policy body come together at the same time and the same place. Admin. Code § 67.3(b)(1). (A meeting may also occur even if a majority of the members do not come together at the same time or place. See “Seriatim Meetings” below.) A meeting occurs even if no action is taken. The Brown Act and Sunshine Ordinance protect the public’s right to observe and participate in the legislative process even when the policy body is only gathering information or discussing an issue.

The Sunshine Ordinance’s expansive definition of a meeting should not be construed so literally as to yield absurd results. For example, during a recess of a meeting of a three-member committee, there is no unlawful “meeting” if two of the committee members happen to find themselves in the same elevator, provided they do not then discuss committee business.

1. “NON-MEETINGS”

There are limited instances where a majority of a policy body may be present at an event, without their attendance constituting a meeting of the policy body. As long as the members refrain from using the occasion to collectively discuss business, a majority of mem-

bers of a policy body may attend the following events without their attendance constituting a quorum: (1) a regional, statewide or national conference; (2) a meeting organized to address a topic of local community concern and open to the public; and (3) an open and noticed meeting of a standing committee of the policy body, provided that the members of the policy body who are not members of the committee attend as observers.

2. RETREATS

Commissioners often wonder whether they may go on a retreat simply to get to know one another and share common concerns regarding their duties as members of a particular commission. Any policy body, including a commission, may hold a retreat. A retreat is a meeting and may not be conducted without notice, an agenda, and an opportunity for the public to attend and comment. Except for extremely limited circumstances, retreats, like all meetings, must be held within San Francisco.

3. SOCIAL OCCASIONS

Under the Brown Act, a purely social gathering of a policy body is not a meeting provided that the members refrain from discussing any business. Certain social gatherings, however, are subject to provisions of the Sunshine Ordinance. The Sunshine Ordinance provides that a “meal gathering” of a commission before, during or after a meeting is considered to be part of that meeting. Thus, such a gathering is subject to all of the applicable notice and agenda provisions of the Sunshine Ordinance. The public must be permitted to hear and observe the discussion of the members. In addition, the “meal meeting” may not be conducted in restaurants or other accommodations that require a payment to gain access. Admin. Code § 67.3(b)(4)(C).

In addition, as described above, social, recreational or ceremonial occasions sponsored or organized by or for a policy body are subject to the passive meeting provisions of the Sunshine Ordinance. Admin. Code § 67.3(c)(3).

4. MEETINGS BY TELECONFERENCING NOT PERMITTED

“Teleconference” means a meeting of a policy body, the members of which are in different locations, connected by electronic means, through either audio or video, or both. Govt. Code § 54953(b). Under the Brown Act, policy bodies may meet by teleconferencing, subject to the requirements, among others, that the agenda be posted at all teleconference locations and that all such locations be accessible to the public. Govt. Code § 54953. But the City Charter requires the physical presence of the members at the meeting site. Charter § 4.102. Therefore, policy bodies may not meet by teleconference.

5. SERIATIM MEETINGS

Even if a majority of the members of a policy body are not present in one place at one time, an unlawful meeting may take place. Govt. Code § 54952.2; Admin. Code § 67.3(b). Unlawful meetings can occur by fax, e-mail, and telephone or through an intermediary. For example, a meeting may occur when one member telephones a majority of the members to discuss a departmental action. A meeting also occurs when staff telephones a majority of the members to obtain their approval of a departmental action. The Attorney General has referred to a series of communications outside a noticed public meeting, each of which involves less than a majority of the members but which, taken as a whole, involves a quorum of the body, as a “seriatim meeting.” A seriatim meeting is unlawful, because it denies the public access to the information presented to the policy body and denies public participation in the decision making process.

Thus, a majority of the members of a policy body may not meet in person outside of a noticed and public meeting to discuss an item of business. Similarly, a majority of the members may not communicate by telephone, e-mail, or through an intermediary, to develop a consensus on any item of business. Admin. Code § 67.3(b).

Sending a letter, fax, e-mail or other written communication regarding any item of business to a majority of members of the policy body could inadvertently result in a seriatim meeting if that action results in a majority of the members of the policy body negotiating a consensus on the matter. Admin. Code § 67.3(b)(3). Communicating by e-mail is of particular concern because the sender cannot control the actions of others in forwarding and responding to messages. E-mail exchanges can easily lead to a substantive discussion among a quorum of the policy body. We recommend that a member of the policy body who wishes to provide written materials to a quorum of the policy body provide the materials to the secretary or clerk of the policy body to give to the members. The secretary may then include the materials, if appropriate, in the policy body’s agenda packet and public review file, if the policy body is required to maintain one. Admin. Code § 67.9(a).

C. NOTICE AND CONDUCT OF MEETINGS

1. NOTICE OF MEETINGS

a. REGULAR MEETINGS

All policy bodies must establish by ordinance, resolution, motion, or in their bylaws, a time and place for holding regular meetings. Govt. Code § 54954(a); Admin. Code § 67.6(a). If a regular meeting would otherwise fall on a holiday, it must be held on the next business day, unless it is otherwise rescheduled in advance. Admin. Code § 67.6(c).

b. SPECIAL MEETINGS

A special meeting is any meeting held at a time or place other than the time or place for holding regular meetings. Admin. Code § 67.6(f). The presiding officer (i.e., chair or president) or a majority of the members of the policy body may call a special meeting at any time. Govt. Code § 54956. With certain limited exceptions, all meetings of policy bodies must be held in the City. Admin. Code § 67.6(b). A policy body that wishes to hold a special meeting outside of the City should consult with the Office of the City Attorney.

The Sunshine Ordinance requires that notice of a special meeting be given at least 72 hours in advance of the meeting to each member of the policy body and any members of the media who have requested notice in writing. Notice should be delivered as reasonably requested and may be by personal delivery, U.S. mail, e-mail or facsimile. Admin. Code § 67.6(f). In addition, notice must be mailed to members of the public who have a valid written request on file to receive copies of agendas and agenda packets. The notice must also be posted at the San Francisco Main Library Government Information Center, at the meeting site and on the policy body's Web site at least 72 hours in advance of the meeting. Admin. Code §§ 8.16, 67.6(f). The notice must specify the time and place of the meeting and the business to be transacted or discussed. If a special meeting is held at a location other than the policy body's regular meeting place, the Sunshine Ordinance requires that notice be given at least 15 days in advance of the special meeting.¹⁹ Admin. Code § 67.6(f).

c. ADJOURNING AND CONTINUING MEETINGS

The Brown Act uses both the terms “adjourn” and “continue.” These terms refer to a policy body's action to postpone or finish at a later time a noticed meeting or consideration of a specific item or items on the agenda. We use the term “continue the meeting” in this discussion for both types of actions. A policy body may need to continue a meeting when the hour gets late, the body lacks or loses a quorum, the body seeks additional information about an agenda item, or for other reasons.

If no member of the policy body is present for a regular meeting, the secretary or clerk may continue the meeting to a future time and place. (Upon doing so, the secretary or clerk must give the members of the policy body written notice in the same manner required for special meetings, which notice may be waived by the members. Govt. Code §§ 54955, 54955.1, and 54956.) The clerk or secretary may not continue a special meeting.

¹⁹ Where the meeting is held in a different room number in the same building, the 15-day notice provision does not apply. Admin. Code § 67.6(f).

For regular and special meetings, when less than a quorum of a policy body is in attendance, the member or members present may continue the meeting to a future time and place. Govt. Code §§ 54955, 54955.1. (See Section C.3 below for a discussion of the limited number of actions that less than a quorum of a policy body may take.)

The secretary or clerk must post a notice of the time and place for the continued meeting in a conspicuous manner on or near the door of the place of the original meeting. If the continued meeting is scheduled to be held within 24 hours, the notice must be posted immediately. If the continued meeting is scheduled to be held more than 24 hours later, the notice must be posted no later than 24 hours after the continuance. Govt. Code §§ 54955, 54955.1. If time permits, the notice should be posted on the policy body's Web site and at the Library's Government Information Center, and mailed to members of the public who have requested, in writing, to receive meeting agendas. Admin. Code § 67.6(g).

If the continued meeting is held within five days and proper notice of the continuance was given, items on the agenda for the original meeting may be considered at the subsequent meeting without issuing a new agenda. If the continued meeting is held more than five days later, the policy body must comply with all of the notice and agenda requirements for a either a special or regular meeting, as appropriate.

d. CANCELING MEETINGS

If a meeting must be cancelled, the City must provide notice of the change to the public as soon as reasonably possible. The policy body should post the cancellation at the San Francisco Main Library Government Information Center, at the meeting site, and on the policy body's Web site. If sufficient time permits, the policy body should mail notice of the meeting change to those members of the public who have requested, in writing, to receive meeting agendas. Admin. Code § 67.6(g).

2. AGENDAS

a. POSTING AND MAILING AGENDAS

All policy bodies must post their meeting agendas in a location accessible to the public at least 72 hours before the meeting. Admin. Code § 67.7(a). Each policy body is required to send two copies of its agenda to the Government Information Center at the San Francisco Public Library. The Library must receive the copies at least 72 hours before the meeting. Admin. Code § 8.16. In addition, each policy body must post the current agenda on its Web site at least 72 hours before a regular meeting. Admin. Code § 67.7(a). Policy bodies must also send copies of agendas and agenda packets to any member of the public who has on file a valid written request for such materials. (Requests are valid up to a calendar year and, to continue in effect, must be

renewed January 1.) If requested, the agenda and documents constituting the agenda packet must be made available, without surcharge, in appropriate alternative formats to persons with disabilities. Govt. Code §§ 54954.1 and 54954.2; Admin. Code § 67.7(f).

b. CONTENT OF AGENDAS

The agenda must contain a meaningful description of each item of business to be transacted or discussed by the policy body, including whether the entity will take action or only conduct a discussion. These requirements also apply to items to be discussed in closed session. The description must be sufficiently clear and specific to alert a person whose interests are affected that he or she may have reason to attend the meeting or seek more information on the item. The description generally need not exceed 20 words. Govt. Code § 54954.2(a); Admin. Code § 67.7 (a) and (b).

The agenda must refer to explanatory documents, such as correspondence or reports that have been provided to the policy body in connection with an agenda item. The documents must be posted adjacent to the agenda or, if more than one page in length, be available for public inspection and copying at a location indicated on the agenda during normal office hours. Admin. Code § 67.7(b).

Agendas must specify certain information about closed sessions of a policy body depending on the subject of the closed session. (Please see the section below entitled “Closed Sessions.”)

In addition, the Sunshine Ordinance requires that all agendas for all meetings include the following language:

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE

(Chapter 67 of the San Francisco Administrative Code)

Government’s duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City and County exist to conduct the people’s business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people’s review.

FOR MORE INFORMATION ON YOUR RIGHTS UNDER
THE SUNSHINE ORDINANCE OR TO REPORT A
VIOLATION OF THE ORDINANCE, CONTACT THE
SUNSHINE ORDINANCE TASK FORCE.

Each agenda must also include the address, area code and phone number, fax number, e-mail address, and a contact person’s name for the Sunshine Ordinance Task

Force. In addition, each agenda must include information on how to obtain a free copy of the Sunshine Ordinance. Admin. Code § 67.7(h).

Finally, the Sunshine Ordinance requires that each board and commission enumerated in the Charter include on the agenda for each general and special meeting the following statement: Admin. Code § 67.13(d).

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

C. TAKING ACTION ON ITEMS NOT ON THE AGENDA

Generally, only matters listed on the agenda may be acted upon or discussed at a meeting. Under the Sunshine Ordinance, the body may take action on an item not listed on its agenda only in the following situations: 1) upon a determination by a majority vote of the body that an accident, natural disaster or work force disruption poses a threat to public health and safety; 2) upon a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those members present, that (A) the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action were deferred to a subsequent special or regular meeting, or the action relates to a purely commendatory action, and (B) the need for such action came to the attention of the body subsequent to the agenda being posted; or 3) the item was posted on an agenda for a prior meeting of the policy body occurring no more than five calendar days earlier, and at the prior meeting the item was continued to the meeting at which action is being taken. Admin. Code § 67.7(e).

New topics not on the agenda are often introduced at meetings either by members of the policy body or by members of the public. The Brown Act and Sunshine Ordinance prohibit a policy body from discussing or taking action on such topics. If a member of the public makes a statement during the public comment session, members of the policy body may ask questions for clarification, ask staff for factual information, or request staff to report back to the body at a subsequent meeting concerning the matter raised by the comments. The board must calendar the matter for a subsequent meeting before engaging in a substantive discussion of the matter or taking action on it. Admin. Code § 67.7(d).

A policy body may change the order in which items on the agenda are considered and may skip items on the agenda, consistent with the body's bylaws. The presiding offi-

cer must announce the change at the beginning of the meeting or as soon as it is known. Admin. Code § 67.15(e).

d. AMENDMENTS TO ITEMS ON THE AGENDA

Legislation and other proposals may be amended and voted upon at the same public meeting so long as the amendments are within the reasonably foreseeable scope of changes that debate could produce in light of the description of the item on the agenda. If the basic nature of the proposal would be changed, going beyond the scope of the notice on the agenda, the policy body must calendar the proposed change for consideration at a subsequent meeting. Any doubt as to whether another public meeting is necessary should be resolved by consulting the Office of the City Attorney.

3. QUORUM

Generally, under the Charter, a majority of the members of a policy body constitutes a quorum for the transaction of business. “Majority” means the number of members designated by law, rather than the number of seats actually filled. Charter § 4.104.

When a quorum of a body fails to attend a scheduled meeting or the body loses a quorum because of the departure of some of its members, the only official actions that the body may take are to: (1) fix the time to which to adjourn; (2) adjourn the meeting; (3) recess the meeting; or (4) take measures to secure a quorum. See generally, Govt. Code §§ 54955 and 54955.1. Any other action taken by the body is null and void.

Once a meeting ceases, members of the policy body may remain to discuss any matter they choose with the members of the public who have attended. In the event that documents are collected, notes taken or a recording made, they may be presented at the next meeting of the policy body or of one of its committees so that they may become part of the policy body’s record.

If there is a lack of a quorum at a meeting of a policy body that has committees, the parent body may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee happens to be present. Such a committee meeting would require a separate notice and the posting of an agenda.

4. VOTING

Secret ballots are prohibited. All votes must be taken publicly, other than votes at meetings permitted as closed sessions. An absent member may not vote by proxy. Charter §§ 2.108 and 4.104(3); Govt. Code § 54953(c); Admin. Code § 67.16.

With two exceptions, the Charter and Administrative Code require members of policy bodies to vote on every matter before them. Charter § 4.104, last paragraph. As noted elsewhere in this Guide, a member must not vote on a matter where the member's vote would violate a conflict of interest law. In addition, a member may be excused for any reason from voting on a matter by a motion adopted by a majority of members present. Charter § 4.104; Admin. Code § 1.29.

Except for certain procedural matters, when determining whether a vote is approved, the vote count is based on the total number of seats, rather than the number of seats currently filled or the number of members present. Charter § 4.104.

5. RECORDS OF MEETINGS

a. TAPE RECORDINGS

The Sunshine Ordinance requires each board or commission listed in the Charter to tape record each regular and special meeting, including closed sessions. These policy bodies must retain copies of tapes of meetings permanently. Admin. Code § 67.14(b). All policy bodies, even those not listed in the Charter, must tape record closed sessions. Tapes of closed sessions must be retained for at least ten years or permanently, if possible. Admin. Code § 67.8-1(a). A policy body may not charge a member of the public to listen to a tape recording of a meeting, or watch a video recording if the policy body made a video recording. Admin. Code § 67.14(b).

b. MINUTES

i. CHARTER BOARDS AND COMMISSIONS.

The Charter requires each board or commission to keep a record of the proceedings of each regular or special meeting. The record must include how each member voted on each question. Charter § 4.104.

In addition, the Sunshine Ordinance requires the clerk or secretary of every board and commission listed in the Charter to record the minutes of each meeting. Admin. Code § 67.16. The minutes must include the following:

- The time the meeting was called to order and the time the meeting was adjourned;
- The names of the members attending the meeting;
- The roll call vote on each matter considered at the meeting;
- The time the board or commission began and ended any closed session;
- The names of members and the names and titles, where applicable, of any other person attending any closed session (other than the

- names of applicants or employees considered in closed session for employment or employee discipline);
- A list of the members of the public who spoke on each matter if the speakers identified themselves, whether in support or opposition; and
- A brief summary of each person's statement during the public comment. Admin. Code § 67.16.

In addition, when a member has disclosed on the record a personal, professional, or business relationship as required by Section 3.214 of the Campaign and Governmental Conduct Code, that disclosure must be recorded in the minutes. See Section II(F)(5) above.

There are no other requirements for the content of minutes, except for those that a policy body may impose on itself, for example, through its bylaws. There may be variations among policy bodies in the style, length, and content of the minutes of their respective meetings. Generally, the purpose of minutes is to record the action of the policy body.

Any person speaking during a public comment period may supply a brief written summary of their comments. This summary must be included in the minutes if it is limited to no more than 150 words. Admin. Code § 67.16.

The draft minutes of each meeting must be available for inspection and copying no later than ten working days after the meeting. The officially adopted minutes must be available for inspection and copying no later than ten working days after the meeting at which the minutes are adopted. If requested to do so, the body must produce the minutes in Braille or enlarged type. Admin. Code § 67.16. In addition, each board and commission must send two copies of its minutes to the Government Information Center at the San Francisco Public Library. Admin. Code § 87.16. Minutes must also be posted on the board or commission's Web site within 48 hours after approval. Admin. Code § 67.29-2.

It is customary that minutes of a meeting be considered and adopted at the next meeting of the policy body, although that is not legally required. Occasionally a policy body may find it necessary to consider and adopt the minutes at a later meeting.

When considering approval of minutes of a meeting, a policy body may, but is not required to, vote to excuse a member from participating on the basis that the member did not attend that meeting.

ii. **NON-CHARTER BOARDS AND COMMISSIONS, ADVISORY COMMITTEES, AND COMMITTEES OF PARENT BODIES.**

Non-charter boards and commissions, advisory committees, and committees of parent bodies should maintain brief minutes of meetings to maintain a record of attendance by members, the actions taken and the votes on those actions. See also C&GC Code § 3.214 discussed at Section II(F)(5) above (minutes required to record disclosure of personal, professional or business relationships).

6. MAINTAINING A WEB SITE

The Sunshine Ordinance requires each City department to maintain a Web site. Each department must post on its Web site all meeting notices, agendas and minutes of all previous meetings of its policy bodies for the previous three years. The department must post notices and agendas no later than the time the department otherwise distributes this information to the public. The department must post minutes of meetings within 48 hours after they have been approved. Each department must review its Web site regularly and update it at least weekly. Admin. Code § 67.29-2.

D. CLOSED SESSIONS

The Legislature, the Board of Supervisors and San Francisco voters have recognized that a policy body may best discuss certain matters in private. Closed sessions are the exception to the general rule requiring public meetings. The exceptions are strictly limited. See Admin. Code § 67.10.

Even if one of the exceptions discussed below applies, the policy body usually is not required to meet in a closed session.²⁰ The policy body makes the choice in such circumstances whether to meet in public. No member of the public has the right to demand a closed session.

If the policy body meets in closed session, the body may not permit any members of the public to attend. The presence of unauthorized persons waives the confidentiality of the session. The policy body may admit such advisors as are necessary to conduct the business prompting the closed session. In a closed session to deal with a personnel issue, the policy body may invite the employee and his or her representative to hear the proceeding. Prior to entering into a closed session, the policy body must meet in open session to take public comment. Govt. Code § 54954.3.

²⁰ In some instances, State law requires policy bodies to keep certain matters confidential. Under those circumstances, the body must meet in a closed session to discuss such matters.

1. NOTICE AND AGENDA REQUIREMENTS

A gathering of a policy body in closed session is a meeting and therefore subject to most of the requirements of the Brown Act, including public notice and agendas. Before going into a closed session, the policy body must first meet in open session to publicly announce its intent to enter a closed session, state the grounds for the closed session, and take public comment. In the closed session, the policy body may consider only those matters listed on the agenda. Admin. Code § 67.11. See generally, Govt. Code §§ 54954.5, 54956.7 through 54957.

The Brown Act and Sunshine Ordinance require that certain information about closed sessions of a policy body be contained in the agenda. Govt. Code § 54954.5; Admin. Code §§ 67.8, 67.8-1. The requirements differ depending on the subject of the closed session. Please contact the Office of the City Attorney for assistance in drafting agendas for closed sessions.

2. CLOSED SESSIONS ARE CONFIDENTIAL

After a policy body has met in closed session, the body must meet again in public session to take certain actions discussed below. Individual members may not disclose information obtained during the closed session. Only the policy body acting as a group, and subject to state law requiring confidentiality of specific information or records, may determine whether information provided in the closed session may be disclosed to the public. Unauthorized disclosure by a member of the policy body or staff person violates the law and may lead to criminal prosecution or disciplinary action. Govt. Code § 54963.

3. REPORTS ON CLOSED SESSIONS

After a closed session, the board or commission must return to open session. If the policy body took a final action in closed session, it must publicly report the action taken and the vote of every member taken on the action. Govt. Code § 54957.1; Admin. Code § 67.12(b). In certain circumstances, the policy body may defer disclosing the action taken.

The policy body must also post a written summary of the information required to be reported or documents embodying that information by the close of business on the next business day following the meeting. The policy body must post the documents where it posts its agendas. Admin. Code § 67.12(d). In addition, with certain exceptions, the policy body must provide contracts, settlement agreements or other documents finally approved in the closed session to any person who is present at the time the closed session ends and requests the document. If the policy body substantially amends the document so that retyping is required, the policy body need not release the document until normal

business hours after the retyping is done, but the presiding officer or a designee must orally summarize the substance of the amendment for the benefit of the requester or any other person present and requesting the information. Govt. Code § 54957.1(b); Admin. Code § 67.12(c).

Under the Sunshine Ordinance, after a closed session, every policy body must, by motion and vote in open session, decide whether to disclose any or all of its discussion, provided it is not confidential under federal, state or local law. The standard for disclosure is whether the majority deems disclosure to be in the public interest. Any such disclosure must be made through the presiding officer of the body or a person who the presiding officer designates to convey the information. The designated person must have been present in the closed session. Admin. Code § 67.12(a).

4. TAPE RECORDINGS OF CLOSED SESSIONS

The Sunshine Ordinance requires policy bodies to tape record all closed sessions. The policy body must retain the tapes for at least ten years or permanently where “technologically and economically feasible.” Admin. Code § 67.8-1(a). A policy body must make closed session tapes available “whenever all rationales for closing the session are no longer applicable.” Where a policy body meets in closed session under the “anticipated litigation” exception, the tape must be made available to the public: (a) two years after the meeting if no litigation is filed; (b) upon expiration of the statute of limitations for the anticipated litigation if no litigation is filed; or (c) as soon as the controversy leading to the anticipated litigation is settled or concluded. Admin. Code § 67.8-1(a). Contact the Office of the City Attorney before disclosing any tape recordings of closed sessions.

5. MOST COMMON TYPES OF CLOSED SESSIONS

a. PERSONNEL EXCEPTION

Under the Sunshine Ordinance, a policy body may meet in closed session to discuss and act upon the appointment, termination, promotion, discipline or evaluation of any officer or employee, if the body has the power to appoint, employ, dismiss or discipline that officer or employee. Admin. Code § 67.10(b). See also, Govt. Code § 54957(b).

When a closed session is calendared to discuss specific charges or complaints against an employee, the policy body must notify the affected employee at least 24 hours before the meeting. If this notice is not given, any discipline imposed against the employee is void. The employee has the right to demand that the policy body conduct such a meeting in public, but he or she may not demand that the policy body conduct the meeting in private if the policy body has determined to conduct the meeting in public. Govt. Code § 54957(b); Admin. Code § 67.10(b).

A policy body may not hold a closed session to discuss the criteria for the selection or evaluation of an executive officer, the amount to pay an employee, or the body's expectations for a new department head. Because an independent contractor is not an employee, a policy body may not meet in closed session to discuss the employment or termination of an independent contractor. Additionally, the personnel exception does not authorize a policy body to meet in closed session to elect one of its members president or vice-president.

After the closed session, the body must return to open session and report, orally or in writing, any action taken to appoint, employ, dismiss, transfer or accept the resignation of a public employee. The body must name the employee, the action taken, the position affected, and in the case of dismissal for a violation of law or City policy, the reason for the dismissal. A written summary of the information required to be immediately reported, or documents containing that information, shall be posted by the close of business on the next business day following the meeting, in the place where the meeting agendas of the body are posted. Govt. Code § 54957.1(a)(5); Admin. Code § 67.12(b)(4).

The Charter requires the Mayor to appoint many department heads from nominees submitted by the policy body. Charter §§ 3.100(18) and 4.102(5). The policy body may meet in closed session to nominate its candidates. It is not required to make a public report of its nomination decision from the closed session until the first meeting after the Mayor announces the new department head. At that time, the policy body must report the closed session's roll call vote for the Mayor's appointee and post written notice of that action by the next business day following the meeting (see IV.D.3 above) if it has not already done so. The policy body is not required to disclose the identity of or vote for unsuccessful nominees, if there were any.

b. PENDING OR THREATENED LITIGATION

The Brown Act and the Sunshine Ordinance permit closed sessions for attorney-client communications on matters of pending or threatened litigation. Admin. Code § 67.10(d); Govt. Code § 54956.9.

"Litigation" includes any adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. Litigation is considered pending when any of the following circumstances exist:

- An adjudicatory proceeding before a court, administrative body, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally;

- A point has been reached where, in the policy body's opinion on the advice of its legal counsel based on existing facts and circumstances, there is a significant exposure to litigation;
- Based on existing facts and circumstances, the policy body has decided to initiate or is deciding whether to initiate litigation; or
- Based on existing facts and circumstances, the policy body is meeting only to decide whether a closed session is authorized under the exception for "pending litigation."

"Existing facts and circumstances" are limited to one of the following:

- Facts and circumstances that might result in litigation against the agency but which the agency believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed;
- Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced;
- The receipt of a claim pursuant to the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection;
- A statement made by a person in an open and public meeting threatening litigation made on a specific matter within the responsibility of the policy body;
- A statement threatening litigation, made by a person outside an open and public meeting, on a specific matter within the responsibility of the local agency, so long as the official or employee of the policy body aware of the threat makes a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection.

Before holding a closed session under the litigation exception, the Sunshine Ordinance requires the policy body to vote, in open session, whether to invoke the attorney-client privilege to hold the closed session. Admin. Code § 67.10(d).

In addition, the policy body must disclose on the agenda the statutory basis for the closed session. If the session is closed because the agency is a party to formally initiated litigation, the body must state the title of the case, including the case name, court and case number, and the date the case was filed, except in two circumstances: (1) the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties; or (2) to identify the litigation would jeopardize the body's ability to conclude existing settlement negotiations to its advantage. Admin. Code §§ 67.8(a)(3) and 67.8-1(b).

Where a policy body that has final decision making power is holding a closed session to discuss a potential settlement of litigation, the Sunshine Ordinance imposes additional requirements. The agenda for the closed session must also include the names of the parties, the case number, the court, and the material terms of the settlement. Admin. Code § 67.12(b)(3). In addition, where a settlement would commit the City or a department to adopting, modifying or discontinuing an existing policy, practice or program or to pay an amount of money equal to or more than \$50,000, the policy body must disclose any written settlement agreement and any documents attached to or referenced in the settlement agreement at least ten days before the closed session meetings. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the City's interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of a settlement, the documents need not be disclosed until the other case is settled or otherwise finally concluded. Admin. Code § 67.12(b)(3).

After holding the closed session, the body must return to open session and report any approval given to legal counsel to prosecute, defend, seek or refrain from seeking appellate review or relief, or enter as a party, intervenor or an amicus curiae in any form of litigation. The report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order to be defended against, or any factual circumstances or contractual dispute giving rise to the City's complaint, petition or other litigation initiative. Govt. Code § 54957.1(a)(2) and (3); Admin. Code § 67.12(b)(2). See also, Govt. Code § 54957.1(b)(2).

The body may defer giving its report if immediate disclosure of the City's intentions would be contrary to the public interest. In those instances, the body may wait to report until the first meeting after the adverse party or parties have been served in the matter. Govt. Code § 54957.1; Admin. Code § 67.12(b)(2). See also, Govt. Code § 54957.1(b)(2).

c. REAL ESTATE NEGOTIATIONS

The Brown Act and Sunshine Ordinance also permit a body to hold a closed session with its negotiator prior to the agency's purchase, sale, exchange, or lease of real property in order to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. Admin. Code §§ 67.8(a)(2) and 67.12(b)(1); Govt. Code § 54956.8.

Prior to the closed session, the body must hold an open session in which the body identifies its negotiators, the real property or real properties that the negotiations may concern and the person(s) with whom its negotiator may negotiate. Govt. Code § 54956.8.

After the closed session and once the agreement is final, the body must publicly report any approval given to the negotiator. If the body's own approval renders the agreement final, the body shall immediately report that approval, the substance of the agreement, and the vote taken. If final approval rests with the other party to the negotiations, the body shall make the disclosure on its Web site and at the next meeting once the other party has informed the body of its approval. Notwithstanding the final approval, if there are conditions precedent to the final consummation of the transaction, or there are multiple, continuous or closely located properties that are being considered for acquisition, the agreement need not be disclosed until the conditions are satisfied or the agreement has been reached with respect to all of the properties, or both. Govt. Code § 54957.1(a)(1); Admin. Code § 67.12(b)(1).

d. LABOR NEGOTIATIONS

The Brown Act and Sunshine Ordinance permit a policy body to meet in a closed session with the City's designated representatives regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations. Govt. Code § 54957.6; Admin. Code § 67.10(e). The Sunshine Ordinance permits such a closed session only when a policy body has authority over such matters. Admin. Code § 67.10(e).

Any collectively bargained agreement must be made available to the public at least fifteen calendar days before the meeting of the policy body to which the agreement is to be reported. Admin. Code § 67.12(b)(5).

e. MISCELLANEOUS EXCEPTIONS

Policy bodies may also meet in closed session (1) to address national security and public building security measures (Govt. Code § 54957(a)); (2) to consider license ap-

plications by persons with criminal records (Govt. Code § 54956.7); and (3) for other special, limited circumstances, particularly when constitutional rights are at stake. The Office of the City Attorney is ready to advise as the need arises.

E. RIGHTS OF MEMBERS OF THE PUBLIC AT PUBLIC MEETINGS

1. PUBLIC COMMENT

The Brown Act and Sunshine Ordinance give the public the right to speak at all meetings of policy bodies. Members of the public have the right to speak on each item on the agenda, whether scheduled for discussion or action. The public must be allowed to speak on an item before the policy body takes action on it. This requirement ensures meaningful participation in the deliberations of the policy body. Govt. Code § 54957(a); Admin. Code § 67.15(a).

At a regular meeting, the public also has the right to speak on any item within the subject matter jurisdiction of the policy body, even if the item is not on the agenda. A policy body is not required, but may choose, to offer the public the opportunity for this “general public comment” at a special meeting. Govt. Code § 54954.3.

The Board of Supervisors, only, is not required to provide for public comment on items before the full Board that were previously considered at a committee meeting at which public comment was allowed, or that were previously considered at a meeting of the full Board, sitting as a committee of the whole, at which public comment was allowed. Govt. Code § 54954.3; Admin. Code § 67.15(a).

A member of the public has a right to comment anonymously. The presiding officer may request that each speaker fill out a speaker card or state his or her name for the record, but may not require the speaker to disclose his or her identity. See Govt. Code § 54953.3 and Admin. Code § 67.16.

Members of a policy body may offer public comment at the meeting of another policy body. Members retain their right to comment publicly on the wisdom or propriety of government actions, including those of the policy body on which they sit. Admin. Code § 67.17. Special provisions govern comment by members of the Board of Supervisors at the meeting of another policy body. Charter § 2.114. Further, members of policy bodies who perform quasi-judicial functions, such as granting or revoking permits, need to be careful about their public comments. Quasi-judicial boards must afford a fair hearing to the parties before them. Central to a fair hearing is a requirement that decisionmakers come to the hearing with an open mind, prepared to hear both sides and to decide the case on the merits of the evidence presented. A member of a policy body who makes public statements or advocates in support of or opposition to a party who later appears

before that body in a quasi-judicial proceeding could be vulnerable to a charge that the member is biased on the matter. Members of such bodies should confer with the City Attorney's Office when these issues arise.

2. TIME LIMITS FOR PUBLIC COMMENT

A policy body has the power to adopt reasonable rules and regulations relating to public comment. The Sunshine Ordinance requires all policy bodies to allow each member of the public to speak once on each calendared item for up to three minutes. The policy body may limit public comment on an agenda item to less than three minutes per speaker, based on such factors as the nature of the agenda item, the number of anticipated speakers for that item, and the number and anticipated duration of other agenda items. The Sunshine Ordinance requires the policy body to apply time limits uniformly to members of the public wishing to testify. Admin. Code § 67.15(c). If, however, a member of the public has a disability that impairs her ability to speak, the policy body must extend her time to speak to accommodate her disability. In addition, additional time may be granted to accommodate members of the public requiring use of a translator.

A body may wish to adopt a rule limiting public testimony in situations where an agenda item is heard in one meeting and public testimony is taken on the item, and it is continued to the next meeting for deliberation and action. In this situation, the public body may preclude individuals from testifying at the subsequent meeting on an item with regard to which they have already provided testimony. Individuals attending the second meeting, who did not speak at the first meeting, should be allowed to testify. In addition, individuals who have points to make regarding issues that were not raised at the first meeting should also be allowed to testify.

If the parent board or commission limits a committee's authority to hear only those items referred to it by the parent board or commission, then the committee may limit public discussion to the items on its agenda. In other words, such committee is not required to take general public comment on items that are not listed on the agenda. Persons desiring to speak on non-agenda items may address those items at meetings of the parent board or commission, provided the items are within the jurisdiction of the parent board or commission. Govt. Code § 54954.3(a).

3. AVAILABILITY OF AGENDAS AND OTHER RECORDS RELATING TO MEETINGS

As a general rule, meeting agendas and other documents distributed to a majority of the members of a policy body in connection with a matter to be considered at a meeting must be made available to the public. Govt. Code § 54957.5(a). Moreover, even if a document has not been distributed to a majority, it must be made available to the public if it is intended to be distributed to a majority in connection with a matter anticipated for discus-

sion or consideration at a meeting, and is on file with the clerk of the policy body. Admin. Code § 67.9(a).

These general rules are qualified by an exception. If the document is otherwise exempt from public disclosure, it typically remains exempt. Govt. Code § 54957.5(a); Admin. Code § 67.9(a). For example, a privileged attorney-client memorandum distributed to a majority of members of a policy body does not lose its confidential status by virtue of the distribution. Please consult with the Deputy City Attorney assigned to your policy body if advice is needed as to who may authorize the disclosure of privileged documents.

Any person may request to receive the meeting agenda and agenda packet. The request must be in writing. The materials must be mailed to the member of the public at the same time they are mailed to the members of the policy body or when the agenda is posted, whichever is earlier. The written request is valid for the calendar year in which it is filed and must be renewed by January 1st of each year. Govt. Code § 54954.1. We suggest that policy bodies notify members of the public who have made a standing request for such materials of their need to renew the request annually.

A policy body may charge only mailing costs, plus one cent per page, for a copy of an agenda or other record prepared for distribution at a meeting, unless a special fee has been established under a process outlined in the Sunshine Ordinance. Admin. Code §§ 67.9(e), 67.28(d).

Upon request, all policy bodies must make agendas and documents constituting the agenda packet for each meeting available, without surcharge, in alternative formats to individuals with disabilities. Govt. Code §§ 54954.1 and 54954.2; Admin. Code § 67.7(f).

Records that are distributed during a public meeting but before the commencement of the discussion must be made available for public inspection before and during the discussion. Admin. Code § 67.9(c). Records that are distributed during the discussion of the item at a public meeting must be made available for public inspection immediately or as soon after the discussion as is practicable. Govt. Code § 54957.5; Admin. Code § 67.9.

4. TAPE RECORDING, FILMING AND PHOTOGRAPHING PUBLIC MEETINGS

The Sunshine Ordinance gives members of the public the right to tape record, film or take photographs of public meetings, unless the body makes a reasonable finding that this activity persistently disrupts the meeting. Admin. Code § 67.14(a).

5. DISABLED ACCESS

All policy bodies must provide sign-language interpreters or note-takers at each regular meeting if the body has received a request for such services at least 48 hours before the meeting.²¹ In addition, each board and commission must ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting. Govt. Code § 54953.2; Admin. Code § 67.13. Finally, policy bodies must make disability-related modifications or accommodations necessary to permit a person with a disability to participate in a public meeting. For example, policy bodies must make agendas, minutes and other writings distributed at public meetings available in appropriate alternative formats, upon request. Govt. Code §§ 54953.2, 54954.1, 54954.2, 54957.5.

F. DISRUPTION OF MEETINGS

Generally, there are two sorts of disruptions that can occur at meetings. In some cases, individuals disrupt the meeting by making noise, speaking out of turn, or otherwise refusing to comply with the policy body's rules governing their meetings. Individuals engaging in such conduct may be arrested and removed from the meeting. Before a presiding officer asks the police to arrest a person for disrupting a meeting, the offending individual should be warned and be given an opportunity to correct the behavior.

In other cases, there may be a general disruption of such a nature that order cannot be restored by the removal of the willful disrupter. In these situations, the policy body may order the room cleared and then continue in session. In such an event, representatives of news media not involved in the disruption have a right to remain in the meeting. A policy body may adopt a procedure to readmit individuals not responsible for the disruption. As an alternative to ordering the room cleared, the policy body may choose to continue the meeting to another date, or may take a short recess. Govt. Code § 54957.9.

²¹ Where a policy body meets on a Monday, the request for such services must be made by 4:00 p.m. on the last business day of the preceding week.

V. PENALTIES AND ENFORCEMENT

The Brown Act, Public Records Act and Sunshine Ordinance all provide substantial penalties for violation of their provisions.

A. PENALTIES FOR VIOLATING THE BROWN ACT

1. WILLFUL VIOLATION A MISDEMEANOR

The Brown Act provides that each member of a policy body who attends a meeting of the body where an action is taken in violation of the Brown Act and where the member intends to deprive the public of information to which the public is entitled is guilty of a misdemeanor. Govt. Code § 54959.

2. INVALIDATION OF ACTION

A court may declare an action taken by a policy body in violation of certain provisions of the Brown Act null and void. Any interested person may request such relief. Before filing an action in court, the individual must first serve a written demand letter on the policy body explaining the violation to give the policy body an opportunity to correct the violation. If the policy body does not do so and a court finds that the body violated specified provisions of the Brown Act, the court may set aside the action. The court may also award the plaintiff court costs and attorneys' fees. Govt. Code § 54960.1.

3. INJUNCTIVE AND DECLARATORY RELIEF

A court may also issue an injunction or declaratory relief to stop or prevent violations or threatened violations of the Brown Act. Any interested person may seek such relief. The court may award court costs and attorneys' fees to the plaintiff. Govt. Code § 54960.

4. PENALTIES FOR DISCLOSING CONFIDENTIAL INFORMATION

The Brown Act provides specific penalties for disclosing, without the policy body's authorization, confidential information acquired in a closed session. Those penalties include injunctive relief to prevent the disclosure of confidential information, disciplinary action, or referral for possible criminal prosecution. Govt. Code § 54963.

B. PENALTIES FOR VIOLATING THE PUBLIC RECORDS ACT

Under the Public Records Act, an individual may sue to enforce his or her right to inspect or receive a copy of a record. If the court finds that the decision to refuse disclosure is not justifi-

fied, the court may order the official to disclose the record. The court may award court costs and attorneys' fees if the plaintiff prevails.²² Govt. Code §§ 6258 and 6259.

C. PENALTIES FOR VIOLATING THE SUNSHINE ORDINANCE

The Sunshine Ordinance specifies substantial penalties for violations of its provisions.

1. WILLFUL VIOLATION IS OFFICIAL MISCONDUCT

First, and most importantly, willful failure of any elected official, department head, or "other managerial City employee" to discharge any duties imposed by the Sunshine Ordinance, Brown Act or Public Records Act is official misconduct. The Ethics Commission is authorized to hear complaints involving willful violations of these laws by elected officials or department heads. Admin. Code § 67.34.

2. ADMINISTRATIVE APPEALS OF PUBLIC RECORDS REQUESTS

The Sunshine Ordinance provides for an administrative appeals process through which a requester can challenge a department's denial of access to records. A requester may petition (1) the Sunshine Ordinance Task Force for a determination whether a department has violated the Public Records Act or the Sunshine Ordinance regarding access to public records and/or (2) the Supervisor of Records (Office of the City Attorney) for a determination whether the requested record should be disclosed. If the decision is that denial was improper and the department then does not produce the record, both the Task Force and Supervisor of Records will refer the matter to an enforcing agency. Admin. Code §§ 67.21(d) and (e); 67.30(c).

3. RIGHT TO COURT ENFORCEMENT OF THE ORDINANCE

The Sunshine Ordinance authorizes any person to institute court proceedings to enforce the Ordinance. Any individual may sue to enforce his or her right to inspect or receive a copy of any public record, to enforce his or her right to attend any meeting required to be open, or to compel such meeting to be open. In addition, if a City or state official does not take action within 40 days after a complaint is filed, an individual may sue for enforcement of the Ordinance. Admin. Code § 67.35.

²² If the court finds that the plaintiff's case is "clearly frivolous," it may award court costs and attorneys' fees to the public agency.

VI. SAN FRANCISCO CHARTER SECTION 16.112: REQUIRED NOTICE FOR CERTAIN CITY ACTIONS

San Francisco Charter section 16.112 sets forth requirements, beyond those imposed by the Brown Act and Sunshine Ordinance, for providing notice of and public hearings before the City takes certain actions. Section 16.112 requires the City to hold public hearings before: closing, eliminating, or significantly reducing the level of services at any facility used by the public; significantly changing the operating schedule or route of a transit line; instituting or changing any fee, rates or fares affecting the public; or adopting any amendment to the general plan or change in zoning or land use. Section 16.112 requires the City to publish notice of these public hearings in the City's official newspaper.

In addition, section 16.112 requires the City to publish notice of: any sale, lease, rental, encumbrance or exchange of real property held by the City; the formation of special assessment districts and the conduct of hearings on protests of special assessment districts; the issuance of requests for bids or proposals involving expenditures of \$50,000 or more and the award of contracts for the same; and polling places and precinct officers for any election.

Because of other changes the 1996 Charter makes to the powers of the Board of Supervisors, Charter section 16.112 primarily affects the Board. Certain of its provisions may affect other City departments, commissions and boards. For further information on this requirement, please contact the Office of the City Attorney.

VII. THE CITIZENS' RIGHT-TO-KNOW ACT OF 1998: NOTICE BEFORE APPROVING CITY PROJECTS

On June 2, 1998, San Francisco voters approved the Citizens' Right-To-Know Act of 1998 (San Francisco Administrative Code Chapter 79). The Act requires City departments to post public notice prior to approving certain types of City projects. The criteria that trigger the need for posting and the timing of the posting are very fact-specific.

A "City Project," for purposes of the Act, is a project that houses City operations or provides services or assistance to the public and involves new construction, a change in use, or a significant expansion of an existing use at a specific location.²³ Admin. Code § 79.2(b). A City Project must either be undertaken directly by a City department, or by a contractor or other agent that receives \$50,000 or more in City funding for the construction work or operating expenses from

²³ Under the Act, the Zoning Administrator interprets the terms "change in use" and "significant expansion of an existing use." Admin. Code § 79.2(d).

that particular location. City funding includes funding from federal, state or other sources that is administered by the City. Admin. Code § 79.2(c).

The following projects are exempt from these requirements: (1) a shelter for battered persons; (2) certain family care, foster or group homes serving six or fewer persons; (3) a project undertaken solely to achieve compliance with disabled access laws; (4) a project in the public right-of-way; and (5) a project outside the City limits. Admin. Code § 79.3.

A department sponsoring a City Project must give the public notice at least 15 days prior to that department's final "approval" of the project. "Approval" means an action by the City officer, department, board or commission that is sponsoring a City project in which a "final commitment" is made to fund or undertake the project. Admin. Code § 79.2(a) and 79.5.

The point at which "approval" occurs differs from City department to City department. By way of example, where a Commission governs the department, final approval may occur when the Commission approves funding for a project or approves the acquisition of land for a project. Where a department head or elected official has the authority to approve projects without action by a Commission, approval may occur when the department head enters into an architectural services contract, signs loan documents or awards a grant. "Approval" does not include a decision to undertake a preliminary study of one or more potential sites for a project. Rather, "approval" occurs when the sponsoring department makes a firm commitment to move forward with or fund a project at a particular location.

The notice required by the Act must be posted at least 15 days prior to the approval of the project, and must remain posted through the actual approval. The Act requires that a sign be posted on the property. The sign must be entitled Notice of Intent to Approve a City project at this location, and must identify the officer, department, board or commission that will consider approval of the project, the date of consideration, and how to obtain more information. Section 79.5 of the Ordinance describes the signposting requirements in more detail. The Director of Administrative Services has developed a standardized sign that may be used to satisfy the Act.

Instead of signposting, a department may send mailed notice to property owners and occupants in a 300-foot radius of the property at least 20 days prior to consideration of the project approval. Admin. Code § 79.6.

VIII. THE AMERICANS WITH DISABILITIES ACT NOTICE PROVISIONS

Title II of the Americans with Disabilities Act requires public agencies, including City departments, to give notice to applicants, participants, beneficiaries, and all other interested persons of the rights and protections afforded by the Americans with Disabilities Act and its applicability to

the services, programs, or activities of the City department. (28 CFR § 35.106.) The Mayor's Office has prescribed use of the following notice by City departments on pamphlets, brochures, and notices describing programs, benefits, services or employment opportunities. In addition, the statement must be posted in places where the public meets with department staff.

Policy of Nondiscrimination on the Basis of Disability and Equal Employment Opportunity Statement:

The (name of agency) does not discriminate on the basis of disability in employment or in the admission and access to its programs or activities.

(Name of the ADA coordinator, address, phone number, and TTY or TDD number) has been designated to coordinate and carry out this department/agency's compliance with the nondiscrimination requirements of Title II of the Americans with Disabilities Act (ADA). Information concerning the provisions of the ADA, and the rights provided thereunder, are available from the ADA coordinator.

IX. THE APPLICATION OF PUBLIC MEETINGS AND PUBLIC RECORDS LAWS TO PRIVATE ENTITIES

Some provisions of the Brown Act, Public Records Act and Sunshine Ordinance apply to some private entities. In 1998, San Francisco enacted the Nonprofit Public Access Ordinance, a law governing public access to the meetings and records of some nonprofit organizations that contract with the City. The 1999 amendments to the Sunshine Ordinance also affect private entities that do business with the City.

A. THE BROWN ACT

In limited circumstances, a board of directors of a private entity may be subject to all of the provisions of the Brown Act: first, where the corporation is created by the Board of Supervisors in order to exercise authority that may lawfully be delegated by the Board to a private corporation or entity; or second, where an entity receives funds from a local agency and the membership of the board of directors includes a member of a policy body of that agency appointed to the board as a full voting member by the policy body. In those circumstances, the corporation's board must conduct its meetings in conformance with all of the provisions of the Brown Act. Govt. Code § 54952(c).

B. THE PUBLIC RECORDS ACT

In the same limited circumstances, a private entity may also be subject to the provisions of the Public Records Act. A private entity whose meetings of its board of directors are subject to the Brown Act, as described directly above, is also subject to the Public Records Act.²⁴ Govt. Code § 6252(b). Therefore, the records maintained by such an organization are considered public records, just like records maintained by City departments.

C. THE SUNSHINE ORDINANCE (SAN FRANCISCO ADMINISTRATIVE CODE CHAPTER 67)

As described above in Section IV.A.2., in limited circumstances, the Sunshine Ordinance's passive meeting rules apply to some meetings of some private entities.

The Sunshine Ordinance provides that private entities consisting of multimember bodies that are primarily formed or existing to serve as a non-governmental advisor to a member of a policy body, the Mayor, the City Administrator, a department head or any elective officer are subject to the passive meeting rules. Admin. Code § 67.4(a)(5). Where a City official does not form such a committee, generally, only its meetings with City officials will be subject to passive meeting rules. Nevertheless, the Sunshine Ordinance also recognizes privacy rights of individuals and entities. Admin. Code § 67.1(g). As a result, there may be cases where the Ordinance should not be interpreted to require public access to such meetings. Public officials with questions concerning their obligations upon attendance at such committee meetings should contact the Office of the City Attorney.

If a private entity organizes a social, recreational or ceremonial occasion for a policy body to which a majority of the body has been invited, the gathering is subject to the passive meeting rules. The gathering must be open to the public without charge. While the entity is not required to provide notice of the event to the public, upon inquiry by a member of the public, the time, place and nature of the event must be disclosed. Admin. Code § 67.3(c)(3).

If a private entity owns, operates or manages any property in which the City has or will have an ownership interest and on which the entity performs a governmental function related to the furtherance of health, safety or welfare, that portion of any meeting of the governing board of the corporation relating to its City business must comply with the passive meeting provisions. Admin. Code § 67.4(b).

²⁴ Prior to January 1, 1999, the Public Records Act applied to any "nonprofit organizations of local governmental agencies and officials which are supported solely by public funds." Effective January 1, 1999, the Public Records Act has been amended to apply only to private entities that are subject to the Brown Act.

The portion of the meetings relating to City business must be open to the public. Upon request, the corporation must disclose the time, place, and nature of the meeting and event, as well as any agenda prepared. At those meetings, the board may, but is not required to, take public comment. In addition, the Sunshine Ordinance requires that the entity's records relating to the government-related activities be made available to the public.

D. THE NONPROFIT PUBLIC ACCESS ORDINANCE (SAN FRANCISCO ADMINISTRATIVE CODE CHAPTER 12L)

Effective October 17, 1998, the San Francisco Board of Supervisors enacted Chapter 12L of the Administrative Code, the Nonprofit Public Access Ordinance. These provisions impose public access requirements on certain nonprofit entities that contract with the City. See Admin. Code §§ 12L.1-12L.10.

These requirements apply to nonprofit organizations that receive at least \$250,000 per year in funding provided by or through the City and have at least one “contract” with the City, as that term is defined in the legislation. The legislation defines a “contract” to include any agreement under which a nonprofit receives City-provided or City-controlled funds for its operations or programs or for goods or services that it provides to the public. Agreements to provide the City with goods used by City government itself (such as office supplies or similar items), and agreements to provide services or benefits to City employees and/or their dependents, are not “contracts” under the amendments. Money that a nonprofit receives under such agreements will count toward the \$250,000 annual threshold, so long as the nonprofit has another agreement with the City that is a “contract” under the legislation.

1. OPEN BOARD MEETINGS

Each organization covered under the Ordinance must allow the public to attend at least two typical meetings per year of its Board of Directors. Members of the public who attend those meetings must be allowed to address the Board on subjects of public interest relating to the organization's operations. At least 30 days before each such designated public Board meeting, the organization must send written notice of the meeting's date, time, and location to the Clerk of the Board of Supervisors for posting. Upon request, each organization must inform any member of the public of the next designated public meeting's date, time, and location.

The organization is not required to alter the location or facility in which its Board meets. A nonprofit organization may preclude the public from attending those portions of a designated public Board meeting which concern specified subjects (generally where public attendance at that portion of the meeting would result in the violation of client or do-

nor confidentiality, the violation of the attorney-client privilege, or disclosure of a trade secret; or when the Board will be discussing litigation, real estate acquisitions, or employee hiring or performance). Finally, nonprofit organizations engaged primarily in abortion counseling or abortion services, domestic violence sheltering, or suicide prevention are not required to open their Board meetings to the public.

2. PUBLIC ACCESS TO FINANCIAL RECORDS

Each organization subject to the Ordinance is required to make available for public inspection and copying (1) its most recent budget, as provided to the City in a grant or contract application; (2) its most recent tax returns; and (3) any financial audits or performance evaluations of the organization done within the last two years by or for the City, so long as the City has not designated them as confidential. No document need be made available to the public if doing so would reveal the identity of the nonprofit donor(s), or the amount or nature of any donation.

The public may inspect these documents during the organization's regular business hours, or receive copies, upon 10 days' notice.

3. COMMUNITY REPRESENTATION ON THE BOARD

As City policy, the Ordinance calls for each nonprofit organization subject to the Ordinance to make good-faith efforts to promote the membership, on its Board, of at least one member of the community served by the organization. In order to encourage such community participation, each organization is required to give public notice of Board vacancies; allow members of the public to propose themselves for Board membership; and allow the public to comment on Board membership issues during at least one designated public Board meeting per year.

4. RESPONSIBILITY FOR THE COSTS OF COMPLYING WITH THE ORDINANCE

Members of the public who request copies of financial records may be charged the direct costs of copying and mailing those records. Each covered nonprofit organization will be responsible for any costs incurred in complying with these requirements other than direct copying or mailing costs, up to a ceiling of \$500 per year.

5. ENFORCEMENT OF THE ORDINANCE

Complaints from the public concerning an organization's compliance with these requirements will be handled by a three-stage non-binding dispute resolution process. That process consists of review of the complaint and recommended resolution by the contracting City department; optional advisory review by the Sunshine Ordinance Task

Force; and review and recommended resolution by the Board of Supervisors. If an organization materially breaches its obligations under the Ordinance, the contracting City department is authorized, but not required, to terminate or decline to renew the organization's contract.

E. PROVISIONS OF THE SUNSHINE ORDINANCE AFFECTING PRIVATE ENTITIES

The Sunshine Ordinance contains provisions affecting private entities that do business with or make donations to the City.

1. CONDITIONS ON THE CITY'S RECEIPT OF OUTSIDE FUNDING FROM PRIVATE ENTITIES

The Sunshine Ordinance places certain conditions upon the acceptance of or spending of "outside funding" to carry out or assist any City function. It provides that no official, employee or agent of the City may accept, direct or influence the spending of any money, goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function, unless the City discloses the amount and source of all such funds. Admin. Code § 67.29-6.

The disclosure must include the amount of the contribution, the source of the contribution, the names of all individuals or the organization contributing such money and a statement as to any financial interest the contributor has involving the City. In general, the department receiving or directing the funds must make such disclosure on its Web site. In addition, entities that provide or manage such funds must generally agree in writing to make these disclosures. Admin. Code § 67.29-6.

a. WHAT IS OUTSIDE FUNDING?

Outside funding is gifts made to the City by private entities for City functions. Private entities include both for profit and nonprofit entities. Outside funding does not include any state or federal government funds for City programs. The City is required to disclose receipt of government funds under the Public Records Act.

b. WHAT IS A CITY FUNCTION?

A City function is any of the services, events or responsibilities ordinarily undertaken by the City. City functions can include providing City services, such as road or park maintenance. In addition, City functions can include civic events sponsored by the City such as parades, conferences or festivals.

The following are some factors that may be considered in determining whether something is a City function:

- Does the City traditionally perform the function?
- Does the City have an obligation to perform the function?
- Does the City pay for any part of the function?
- Does the City provide insurance for the function?
- Does the name of the function include the City or City official?
- Do City personnel oversee the function?
- Do City personnel attend or work at the function on City time?

c. WHAT IS A FINANCIAL INTEREST?

A financial interest includes a contract, grant, lease or request for license, permit or other entitlement for use.

d. WHAT IS \$100 IN THE AGGREGATE?

The Sunshine Ordinance requires the City to report more than \$100 “in aggregate.” The department must consider the aggregate amount of the contribution for each function for which it receives outside funding.

2. CITY MUST ENSURE PRIVATE ENTITIES MAINTAIN ACCURATE RECORDS OF TRANSACTIONS WITH CITIZENS

The Sunshine Ordinance places a condition on any contract, agreement or permit between the City and an outside entity for performance of a City-related program, function or service that authorizes the entity to demand any funds or fees from citizens. The agreement must contain a provision requiring the entity to maintain accurate records of each transaction. The Ordinance requires such records to be available to the public and provides explicit penalties for violating this provision. Admin. Code § 67.29-7(c).

The Sunshine Ordinance explicitly provides that this provision applies to: (1) any agreement allowing an entity to tow or impound vehicles in the City; and (2) any agreement allowing an entity to collect any fee from persons in any pretrial diversion program. For guidance on what other agreements are for performance of a City program, function or service, please see Section IX.E.1, Conditions on the City’s Receipt of Outside Funding from Private Entities, directly above. Admin. Code § 67.29-7(c). The requirement does not apply to leases or concessions on City property.

Prior to releasing such records City departments must redact the names, addresses, and any other identifying or other personal information relating to the citizens receiving services. Please contact the Office of the City Attorney prior to releasing such records.

3. CONDITIONS ON CITY SUBSIDIES TO PRIVATE ENTITIES

The Sunshine Ordinance places certain conditions on the City's ability to give subsidies to private entities, including nonprofit organizations. The Ordinance provides that the City cannot give a subsidy in funds, tax abatements, land or services to any private entity unless that private entity agrees in writing to several conditions. Subsidies in the form of grants, tax incremental financing and below market leases are subject to this provision. Admin. Code § 67.32.

The entity must provide the City with financial projections (including profit and loss figures) for the project for which the subsidy is provided. In addition, it must provide annual audited financial statements for the project thereafter. These requirements apply only to the specific project for which the subsidy is provided and not to the entire operations of the private entity. All such projections and financial statements shall be available to the public. Admin. Code § 67.32.

X. CONCLUSION

We hope this information is useful. We encourage you to contact the Office of the City Attorney with any questions specific to your department.

PUBLIC MEETINGS CHECKLIST

The Public Meetings Checklist provides a brief summary of the requirements for notice, agenda and minutes for public meetings in San Francisco.

The checklist is designed to help policy bodies comply with state and City sunshine laws. For more information on Sunshine requirements, please consult the Sunshine sections in this guide or contact the Deputy City Attorney assigned to your policy body.

I. NOTICE OF MEETINGS

These requirements apply to all policy bodies, including all boards and commissions, whether Charter-created or not, committees, task forces, and committees of commissions/boards.²⁵

A. REGULAR MEETINGS

Each policy body must establish a time and place for regular meetings by ordinance, resolution, motion, or bylaws; and each policy body must post the regular meeting time and place on the department Web site. In addition, the policy body must mail and post agendas of its meetings. (See Section II, below.)

B. SPECIAL MEETINGS HELD AT THE REGULAR MEETING LOCATION

The policy body must provide notice of the meeting and the agenda (which may be one document) at least 72 hours in advance of meeting:

- To members of the policy body;
- To members of the media who have requested notice in writing;
- By mail, to members of the public who have requested, in writing, to receive copies of agendas and agenda packets (requests are valid up to a calendar year and, to continue in effect, must be renewed January 1); and
- Post the Notice/Agenda at the San Francisco Main Library Government Information Center, Web site, meeting site, and department office.

²⁵ All meetings must be held in San Francisco, unless a specific exception otherwise allows. Please contact the City Attorney's Office if you are considering holding a meeting outside of San Francisco.

C. SPECIAL MEETINGS AT ALTERNATIVE LOCATIONS

The policy body must provide the notice of the meeting 15 days before the meeting:²⁶

- To members of the policy body;
- To members of the media who have requested notice in writing;
- By mail, to members of the public who have requested in writing, to receive copies of agendas and agenda packets (requests are valid up to a calendar year and, to continue in effect, must be renewed January 1); and
- Post the Notice at the San Francisco Main Library Government Information Center, Web site, meeting site, and department office.

The agenda for the special meeting must be posted and mailed 72 hours in advance. (See Section II below.) The alternative meeting site must be accessible to persons with disabilities.

D. CANCELING MEETINGS

The policy body must provide the public with notice of the cancellation as soon as reasonably possible. The policy body must:

- Post the cancellation at the San Francisco Main Library Government Information Center, at the meeting site and on the policy body's Web site.

If sufficient time permits, mail notice of the meeting change to those members of the public who have requested, in writing, to receive meeting agendas.

E. CONTINUING AND ADJOURNING MEETINGS

A policy body may continue the hearing of agenda items and adjourn meetings, subject to specific notice requirements. Please see the sunshine sections of this guide and consult the deputy city attorney assigned to your policy body for more information.

II. AGENDAS

These requirements apply to all policy bodies, including all boards and commissions, whether Charter-created or not, committees, task forces, and committees of commissions/boards.

²⁶ Where the meeting is held in a different room number in the same building, the 15-day notice provision does not apply.

A. POSTING AND MAILING AGENDAS

The policy body must:

- Provide two copies of the agenda to the San Francisco Main Library Government Information Center at least 72 hours before the meeting.
- Post the agenda at the Web site, meeting location and department office at least 72 hours before a meeting.
- At least 72 hours before the meeting, mail copies of agendas and agenda packets to members of the policy body.
- Mail copies of agendas and agenda packets at same time as to members of the policy body to any member of the public who has requested to receive the information in writing (requests are valid up to a calendar year and, to continue in effect, must be renewed January 1).

B. CONTENT OF AGENDAS

1. SPECIFIC AGENDA ITEMS

- Must include a meaningful description of each item of business to be transacted or discussed. Must be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected that he or she may have reason to attend the meeting or seek more information on the item.
- Must include whether the entity will take action – and a description of the proposed action – or a statement that the item is for discussion only. If the item is posted as a discussion item, the policy body may not take action on the item at that meeting.
- Must refer to explanatory documents, such as correspondence or reports that have been provided to the policy body in connection with an agenda item.
- Referenced documents of one page: must be posted adjacent to the agenda.
- Referenced documents of more than one page: note on agenda that documents are available for public inspection and copying at a location indicated on the agenda during normal office hours.

2. FORM LANGUAGE REQUIRED ON EVERY AGENDA

- Time, day and location of meeting.
- That public comment will be taken on each item, before or during consideration of the item.
- Name of contact person and location where public may inspect documents referred to on agenda.

- Information regarding how, to whom, and when a request for a disability-related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.

We suggest you use the following format:

To obtain a disability-related modification or accommodation, including auxiliary aids or services, to participate in the meeting, please contact _____ at least two business days before the meeting.

The following quote:

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE
(Chapter 67 of the San Francisco Administrative Code)

Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE.

[Insert the address, area code and phone number, fax number, e-mail address, and a contact person's name for the Sunshine Ordinance Task Force, which currently is:

Adele Destro
Acting Administrator
Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689
Phone: (415) 554-7724, Fax: (415) 554-5784
E-mail: sotf@sfgov.org

Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Task Force, the San Francisco Public Library and on the City's Web site at <http://www.sfgov.org>.

The following quote:

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other

attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

The following quote:

The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. Please be advised that the Chair may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

3. SUGGESTED LANGUAGE ON EACH AGENDA

The Ethics Commission has requested that each policy body place the following language on each agenda:

- Individuals and entities that influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 30 Van Ness Avenue, Suite 3900, San Francisco, CA 94102, telephone (415) 581-2300, fax (415) 581-2317 and Web site: <http://www.sfgov.org/ethics/>.

C. CLOSED SESSIONS

The sunshine laws permit policy bodies to meet in closed sessions in very limited circumstances. There are specific requirements for the agendas of closed-session meetings, as well as the reports and disclosures a policy body must make after the closed session. Please contact the Deputy City Attorney advising the policy body for assistance.

III. AUDIO OR VIDEO RECORDINGS OF MEETINGS

A. CHARTER BOARDS AND COMMISSIONS

Every board or commission listed in the Charter must record every meeting, whether closed or open, regular or special.

B. POLICY BODIES OTHER THAN CHARTER BOARDS AND COMMISSIONS

1. CLOSED SESSIONS

Every policy body (including all boards and commissions, whether Charter-created or not, and committees of commissions/boards) must record all closed sessions. Recordings may be audio or video recordings.

2. OPEN SESSIONS

Non-charter policy bodies, (including boards, commissions, committees and task forces created by ordinance or resolution, and committees of Charter boards and commissions) are not required to record open sessions.

C. DISCLOSING CLOSED SESSION TAPES

Contact the Deputy City Attorney advising the policy body before disclosing any closed session tape.

IV. MINUTES

A. CHARTER BOARDS AND COMMISSIONS

Every board or commission listed in the Charter must keep minutes of each regular or special meeting, consisting of the following:

1. CONTENT

- The time the meeting was called to order;
- The time the meeting was adjourned;
- The names of the members attending the meeting;
- The roll call vote on each matter considered at the meeting;
- The time the board or commission began and ended any closed session;
- The names of members and the names and titles, where applicable, of any other person attending any closed session. When the policy body is meeting in closed session to consider applicants for employment or employee discipline, the minutes must not contain the names of the applicants or employee;
- A list of those members of the public who spoke on each matter if the speakers identified themselves, whether such speakers supported or opposed the matter; and a brief summary of each person's statement during the public comment; and

- Any person speaking during a public comment period may supply a brief written summary of their comments which must, if limited to no more than 150 words, be included in, or appended to, the minutes.

2. TIMING

The policy body must:

- Make draft minutes available for inspection and copying no later than ten working days after the meeting.
- Make officially adopted minutes available for inspection and copying no later than ten working days after the meeting at which the minutes are adopted.
- If requested to do so, produce the minutes in any alternative format, including Braille or enlarged type.
- Send two copies of its minutes to the San Francisco Main Library Government Information Center.
- Post the minutes on the department's Web site within 48 hours after approval.

B. NON-CHARTER BOARDS AND COMMISSIONS

The Charter requires each board or commission to keep a record of the proceedings of each regular or special meeting indicating how each member voted on each question. Non-charter boards and commissions must keep that record, but are not required to comply with the format listed directly above.

C. COMMITTEES

Committees are not required to keep minutes of their meetings. We advise that committees keep brief minutes consisting of a record of attendance, actions taken and votes on those actions.

V. DISABLED ACCESS

These requirements apply to all policy bodies, including all boards and commissions, whether Charter-created or not, committees, task forces, and committees of commissions/boards.

Each policy body must make any such disability-related modification or accommodation necessary, including providing auxiliary aids or services, to permit a person with a disability to participate in a public meeting. Such accommodations include, but are not limited to:

- Making an agenda available in an appropriate alternative format, upon request;

- Providing sign language interpreters or note-takers, upon request;
- Ensuring accessible seating for persons with disabilities, including those using wheel-chairs, is made available at all meetings;
- Ensuring that writings distributed at public meetings are available in appropriate alternative formats, upon request; and
- Providing minutes in any appropriate alternative format, including Braille or enlarged type, upon request.

A policy body may not impose a fee or surcharge to accommodate a person with disabilities.

VI. REPORTS

The following summary reflects changes to the requirements regarding annual reports enacted by the Board of Supervisors on January 21, 2003.

Each board or commission that oversees a City department must:

- Produce an annual report describing its activities as part of the Annual Statement of Purpose required by Charter section 4.102(2). The report must contain a general summary of the department's services and programs presented in terms and format accessible to the average citizen.
- Post the report on the City's official Web site and transmit the Uniform Resource Locator (URL) for each report to the San Francisco Main Library Government Information Center within ten days of the final approval of the report.²⁷
- Provide a copy of the report printed from the Web page to a member of the public, upon request.

No board, commission or department head may authorize the expenditure of City funds for the purpose of procuring the printing of an annual report without prior approval of the Board of Supervisors.

²⁷ The legislation refers to a "Documents Department" of the Library. We are informed there is no such department. Accordingly, staff should send the information to the Library's Government Information Center.

VII. MAINTAINING A WEB SITE

Each City department must maintain a Web site. Each department's Web site must include the following information for all of its policy bodies (including all boards and commissions, whether Charter-created or not, and committees of commissions/boards):

- All meeting notices, agendas and minutes of all previous meetings of all of its policy bodies for the previous three years.
- All notices and agendas, no later than the time the department otherwise distributes this information to the public.
- Minutes of meetings, within 48 hours after they have been approved.

PUBLIC RECORDS REQUEST CHECKLIST

I. DETERMINE TIMELINE FOR RESPONDING

A. AN “IMMEDIATE DISCLOSURE REQUEST”

The City must respond no later than the close of business on the day following the day of the request (Admin. Code § 67.25(a)). This time line applies **only** if:

- The request states “immediate disclosure request” at the top of the request and on the envelope, subject line or cover sheet in or with which the request is transmitted. Admin. Code § 67.25(a).

The City may have up to 14 additional calendar days to respond if:

- the request is of a voluminous nature,
- the information requested is in a remote storage facility, or
- the department needs to consult with another interested department. Admin. Code § 67.25(b); Govt. Code § 6253(c).

If the department is invoking the extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b).

The Sunshine Ordinance requires a department, when so requested, to produce records as soon as possible on an incremental or “rolling” basis. S.F. Admin. Code § 67.25(d). Therefore, even where a department has additional time to respond and is collecting a large quantity of records, the department, when so requested, must produce records as they are located rather than waiting until all potentially responsive documents have been reviewed and collected.

B. NOT AN “IMMEDIATE DISCLOSURE REQUEST”

The City has up to 10 calendar days to respond. Govt. Code § 6253(c).

The City may have up to 14 additional days to respond if:

- There is a need to search for and collect records from field facilities or other establishments separate from the office processing the request,

- There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request, or
- There is a need to consult with another agency or among two or more components of the agency having a substantial interest in the determination of the request. Govt. Code § 6253(c).

To invoke the extension, the head of the agency, or his or her designee, must notify the requester in writing the reason for the extension and the date on which the response is expected to be dispatched. Govt. Code § 6253(c).

The department has a duty to respond on a “rolling” basis when so requested. The department must provide records as soon as they are available, rather than waiting until the final date to respond.

II. DETERMINE WHETHER ANY RECORDS EXIST THAT ARE RESPONSIVE TO THE REQUEST

A. THE DEPARTMENT MUST MAKE A DILIGENT SEARCH

A department is responsible for searching for records. The department must locate the records even if it thinks the records may be exempt from disclosure. Is the request specific/clear enough to undertake a search? If not, contact the requester and ask for clarification.

B. THERE IS NO DUTY TO RESPOND TO INTERROGATORIES

The Sunshine Ordinance does not require a department to reply to a series of questions or interrogatories. If documents exist that contain answers to the questions, the department should provide those documents to the requester.

C. THE DEPARTMENT MUST ASSIST REQUESTER TO IDENTIFY RECORDS

The Sunshine Ordinance requires all City employees to assist members of the public in identifying the existence, form and nature of any records or information maintained by, available to, or in the custody of the City. Admin. Code § 67.21(c). The California Public Records Act requires the Department to describe the physical location in which the requested records exist and to provide suggestions for overcoming any practical basis for denying access to the records or information sought. These requirements are deemed satisfied if the Department is

unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records. Govt. Code § 6253.1(a) and (b).

An individual may request information regarding the existence and form of records. Within seven days after receiving such a request, the agency must provide the individual with a written statement describing the existence, quantity, form and nature of records relating to a particular subject area. Admin. Code § 67.21(c).

D. THERE IS NO DUTY TO CREATE A RECORD

There is no duty to create a record to meet the specifications of a request. The department must provide the requester with information about records that exist that are similar to or contain some of the information that is requested and provide those records if requester so desires.

E. EXTREMELY BROAD REQUESTS

Where a request specifies an identifiable category of records (see discussion of a proper request in Section II.B.1 of this guide), but is extremely broad and involves voluminous records:

- Contact the requester and ask for more specificity.
- If the requester insists on the broad request, the department or agency should start pulling records and reviewing them to make sure that confidential records are not disclosed. The department should have the requester make arrangements to review the records that are not confidential and allow the requester whatever time the department has available, provided it is reasonable, to review records. The department should continue the process, until the requester reviews all of the desired records.

F. NO RECORDS EXIST

If no records exist, the department should notify the requester, preferably in writing, that after conducting a search, it located no records responsive to the request.

G. DUTY TO REDIRECT REQUEST

Where a department does not have a record responsive to the request, the department must refer the requester to the proper department or agency that may have the requested record. Admin. Code § 67.21(c).

III. RECORDS ARE LOCATED

Review all of the records to determine if any are exempt under mandatory or permissive exemptions.

A. EXEMPTIONS

Where the City is declining to disclose records, the burden is on the City to justify the non-disclosure. The City is prohibited from disclosing some specific categories of records by federal, state or local law (e.g., juvenile court records, employee medical records). Government Code sections 6276-6276.48 list state statutes that prohibit disclosure of certain types of records. That list is helpful, but not exhaustive.

In addition, Government Code sections 6254 and 6254.7 list additional categories of records the City may decline to disclose.

In addition to specific exemptions, the California Public Records Act permits an agency to decline to disclose records where on the facts of the particular case, the public interest in nondisclosure outweighs the public interest in disclosure. Govt. Code § 6255. The Sunshine Ordinance prohibits the City from declining to disclose records under Government Code section 6255.

The “deliberative process” privilege is a court-created exemption found within the Public Records Act. It may be invoked where the disclosure of materials would expose an agency’s decision making process in such a way as to discourage candid discussions within the agency and thereby undermine the agency’s ability to perform its functions. The Sunshine Ordinance now prohibits the City from declining to disclose records under the deliberative process privilege.

B. NO RECORDS ARE EXEMPT FROM DISCLOSURE

- If the department has located the records and none are exempt, the department should notify the requester to come in and inspect records for free, or
- Provide copies to the requester. The department may charge 10 cents per page plus postage for copies assembled to the order of the requester (Admin. Code § 67.28(c)), unless the department prepares and posts an itemized cost analysis establishing a higher cost for copies. Admin. Code § 67.28(d). The department may require the requester to pay for the copies prior to producing the records. Govt. Code § 6253(b).

C. ALL RECORDS ARE EXEMPT FROM DISCLOSURE

When an agency declines to disclose a record requested by a member of the public, the agency is required to justify its refusal by demonstrating the basis for the exemption. (Govt. Code § 6255.) In addition, the Sunshine Ordinance requires that any withholding of information be justified, in writing, as follows:

- A withholding under a specific permissive exemption in the Public Records Act or elsewhere shall cite the authority and explain in factual terms how the public interest would be harmed by disclosure.
- A withholding on the basis that law prohibits disclosure shall cite the specific statutory authority in the Public Records Act or elsewhere.
- A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position. Admin. Code § 67.27.

The department must notify the requester, in writing, that the records were located; the department declines to disclose them; the legal basis for declining to disclose the records; and, if required, the factual basis for invoking a permissive exemption. Admin. Code § 67.27.

There is no requirement that the department provide the requester with a document log listing the documents the department is declining to disclose. The Sunshine Ordinance requires the department to suggest alternative sources for the information requested, if available.

D. SOME RECORDS ARE EXEMPT FROM DISCLOSURE

Determine the bases for exemption.

The department must notify the requester, in writing, that the records were located and inform requester which records are available for inspection or to be copied. The department must notify the requester which categories of records that the department declines to disclose; the legal basis for exemption; and, if required, the factual basis for invoking a permissive exemption. Admin. Code § 67.27.

There is no requirement that the department provide the requester with a document log listing the documents it is declining to disclose. The Sunshine Ordinance requires the department to suggest alternative sources for the information requested, if available.

The department cannot decline to produce a record unless all the information contained in it is exempt from disclosure. The department must redact the exempt material and explain its justification for withholding the information. The Sunshine Ordinance does not permit the department to charge the requester for the costs of redacting the exempt material.

PUBLIC RECORDS REQUEST FORM

Name

Date

Address

City

Telephone.....

Fax.....

Information Requested:

(Please provide a reasonable description of the record(s). Please be as specific as possible.)

.....

.....

.....

.....

- ☐ I want to see the file.
- ☐ I want copies of certain pages in the file(s) that I have marked.
- ☐ I want the entire file copied.
- ☐ I will pick up the information on.....
- ☐ I want the information mailed to the address above.
- ☐ If less than 10 pages, please fax the information to the number shown above.

The cost for copies is 10 cents per page plus postage, except for mass-produced documents. Checks should be made payable to: "City and County of San Francisco."

FOR OFFICE USE ONLY:

Name:.....

Date

By Name

DONOR DISCLOSURE/GIFT ACKNOWLEDGEMENT FORM

Thank you for your generous contribution to [name of department or agency].
In order to help the [name of department or agency] comply with San Francisco's Sunshine Ordinance,* we ask that you please complete this form and return it as soon as possible to: [address where the form should be returned] **Attention: Donor Disclosure.**

Thank you again for contributing to [name of department or agency].

Donor: _____

Date: _____

Gift: _____

Estimated Value: _____

(For gifts other than cash gifts)

Contact Information:

Name: _____ Address: _____

Street _____ Apt. _____

Telephone: _____

City, _____ State _____ ZIP code _____

The above contact information is: _____ Business _____ Residence _____

Financial Interest: The Sunshine Ordinance requires that a department that receives a gift of money, goods or services worth \$100 or more report any financial interest that the donor has involving the San Francisco City government. Please check the appropriate box or boxes below that describe your financial interest(s) in the City.

- ☐ Contract with City (Please describe): _____
- ☐ Grant from the City (Please describe): _____
- ☐ Lease of Space to or from the City (Please describe): _____
- ☐ City License, Permit or Entitlement for Use (Please describe): _____
- ☐ Pending request for a City Contract, Grant, Lease, License, Permit or Other Entitlement for Use. (Please describe): _____
- ☐ Other Financial Interest (Please describe): _____
- ☐ No Financial Interest

*The San Francisco Sunshine Ordinance (San Francisco Administrative Code Chapter 67), as approved by the San Francisco voters in 1999, provides that:

SF C. 67.29-6. Sources of Outside Funding

No official or employee or agent of the city shall accept, allow to be collected, or direct or influence the spending of, any money, or any goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function unless the amount and source of all such funds is disclosed as a public record and made available on the website for the department to which the funds are directed. When such funds are provided or managed by an entity, and not an individual, that entity must agree in writing to abide by this ordinance. The disclosure shall include the names of all individuals or organizations contributing such money and a statement as to any financial interest the contributor has involving the City.

-
- Access to public meetings**
 - Disabled access, 106, 125
 - Agendas, 65, 90, 91, 104, 120, 121**
 - Aiding and abetting violation of local conflict law, Prohibition on, 62**
 - Americans with Disabilities Act, notice provisions of, 110**
 - Annual Reports, 80**
 - Duty to prepare and file with SF public library, 80
 - Annual Sunshine Training, 8**
 - Appointments and Nominations**
 - Prohibition on receiving payment for, 37
 - Attendance of commissioners, 6**
 - Bribery, 53**
 - Brown Act, 67, 75, 84, 85, 86, 87, 89, 92, 97, 99, 102, 103, 107, 108, 109, 111, 112**
 - Business Relationship, Disclosure of, 38**
 - Bylaws for commissions and boards, 16**
 - Calendar, department head, 81**
 - Campaign Contributions**
 - Disqualification because of, 34
 - Exception to gift limits, 51
 - Restrictions on City contractors, 48
 - Restrictions on solicitation by members of appointed boards and commissions, 33
 - Character, Prohibition on voting on own character or conduct, 37**
 - Charter section 16.112, 109**
 - Checklist, Public meetings, 119**
 - Checklist, Public records requests, 129**
 - Citizens Right to Know Act of 1998 (S.F. Admin. Code Chapter 79), 109**
 - City Administrator, Duty to cooperate with, 81**
 - City Attorney, 13**
 - Advice on ethics, open government, 15
 - Client of, 13
 - Role of, 13
 - Closed sessions**
 - Confidentiality of, 97
 - Labor negotiations and, 102
 - Litigation and, 99
 - Miscellaneous exceptions and, 102
 - Most common types of, 98
 - Notice and agenda requirements for, 97
 - Personnel exception, 98
 - Real estate negotiations and, 102
 - Reports on, 97
 - Tape recording of, 98
 - Commissions and boards, 1**
 - Annual Sunshine Training, 8
 - Attendance requirements, 6
 - Bylaws, 16
 - Compensation of, 6
 - Conduct generally, 7
 - Conduct in quasi-judicial proceedings, 7
 - Creation of, 1
 - Election of officers, 17
 - Health services benefits, 6
 - Oath of office, 3
 - Operations of, 16
 - Quorum for, 16, 93
 - Recall of members, 5
 - Removal of members, 4
 - Requirements for members, 3
 - Resignation requirement, 3
 - Resignation from, 5
 - Restrictions on, 10
 - Roles, 8
 - Rules of order, 16
 - Secretary for, 12
 - Term and tenure of members, 3
-

Voting of, 17, 93
Compensated Advocacy, Ban on, 40
Confidential information
Closed sessions, 97
Penalties for disclosing, 107
Prohibition on disclosing or using, 107
Conflicts of interest, 19
Campaign and Governmental Conduct Code, 37
incorporation of state law, 37
Common law doctrine, 36
Government Code section 1090, 35
Political Reform Act, 20
Contracting
Coercion in City contracting, prohibition, 39
Commissioners contracting with City, prohibition on, 46
Conflicts in, See Government Code section 1090, 35, 36, 65
Department head
Calendars of, 81
Duty to maintain and preserve public records, 80
Roles, 12
Disabled Access
Meetings, 106, 125
Disclosure
Personal, professional or business relationship, 38
Dual office holding, 46
Election of commission officers, 17
E-mail, 82
Ethics Commission, 20
Executive officials
Public meeting laws, 86
False charges
Prohibition on filing, 62
Family members
Gifts from, 51
Prohibition on making decisions involving, 37

Fees for public records, 72
Filming public meetings, 105
Financial disclosure
Amendment of forms, 32
Filing location, 31
Requirements, Political Reform Act, 30
Time for Filing, 8, 31
Financial records
Contracts, 77
Public access to nonprofit records, 114
Future employment
Negotiations regarding, 41, 42, 43
One year ban on employment with certain contractors, 42
Gifts
Disqualification because of, 53
Exceptions to gift limits, 51
Bequest or inheritance, 51
Campaign contributions, 51
Family members
Gifts from, 51
Government agency, 52
Hospitality, gifts of, 51
Informational material, 51
Plaques and trophies, 51
Prize or award, 52
Tickets to certain fundraisers, 51
Trophies, 51
Weddings, 52
Family members
Gifts to, 52
Gifts to City, 59
Accepting gifts up to \$10,000, 59
Reporting gifts over \$100, 59
Tickets, 60
Ceremonial function, 61
Joint powers agreement, 61
Part of a contract, 61
Public facility, 60
Individuals, to, 49
Limits on, 49
Lobbyists, gifts from, 54

- Referrals, gifts for, 54
- Restricted source, gifts from, 53
- Subordinates, gifts from, 54
- Tickets, 51
- Wedding, 52
- Government Code section 1090**
 - Making a contract in violation of, 35
 - Noninterests, 36
 - Penalties for violation, 65
 - Remote Interests, 36
- Government decision**
 - Making, 22
 - Participating in making, 22
 - Seeking to influence, 22
- Honoraria**
 - Ban on, 49
- Incompatible Activities**
 - Department Statements, 44
 - Amendment of, 45
 - Notice to employees, 45
 - Required language, 44
- Incompatible Offices, 46**
- Index of records**
 - Duty to compile, 81
- Legally Required Participation in a Decision, 30**
- Legislative or Policy Body, definitions, 84**
- Loans**
 - Gifts, loans as, 58
 - Restrictions on, 57
- Mass mailing**
 - Definition, 62
 - Exceptions, 62
- Materiality**
 - Political Reform Act, 24
 - Standards, 24
- Misuse of public resources, 47**
- Nonprofit Public Access Ordinance (SF Admin. Code Chapter 12L), 113**
- Notice requirements**
 - Citizens Right to Know Act, 109
 - City actions, 109
 - Meetings, 88, 119
- Oath of office, 3**
- Official misconduct, 108**
- Oral information**
 - Providing oral public information, 79
- Passive meeting**
 - Body, defined, 84
 - Rules, 86
- Penalties**
 - Brown Act violations, 107
 - Disclosing confidential information, 107
 - Government Code section 1090, 65
 - Official misconduct, 4, 5, 7, 66
 - Political Reform Act violations, 65
 - Public Records Act violations, 107
 - Removal from office, 66
 - San Francisco ethics laws, 65
 - Sunshine Ordinance violations, 108
- Personal Relationship, Disclosure of, 38**
- Photographing, Public meetings, 105**
- Political Activity**
 - Restrictions
 - During working hours, 48
 - While in uniform, 48
 - While on city premises, 48
- Political Reform Act**
 - Conflict provisions of, 20
 - Financial disclosure, 30
 - Gift provisions, 23
- Post-Employment Restrictions**
 - One-year ban, 42, 43
 - Certain city contractors, 42
 - One-year ban, general, 42
 - Permanent Ban, 41
 - Waiver, 42
- Private entities**
 - Application of public meetings to, 111
 - Brown Act, application to, 111
 - Nonprofits, public access to, 113
- Professional relationship, disclosure of, 38**
- Public comment**
 - General, 103

Time limits, 104

Public Meetings

Action on items not on agenda, 92

Adjourning and continuing, 120

Amendments to items on agenda for, 93

Availability of agendas and other records,
90, 121

Canceling, 90, 120

Checklist, 119

Closed sessions, 123

Disabled access to, 125

Disruption of, 106

Filming and, 105

Minutes of, 124

Notice of, 88, 119

Passive meetings, 84

Photographing and, 105

Public comment and, 103

Records of, 124

Regular meetings, 88

Rights of members of the public at, 103

Special meetings, 89

Tape recording by commission or board,
105

Tape recording by public, 105

Voting, 93

Public Official

Definition, Political Reform Act, 21

Public Records

Checklist, 129

Definition of, 68

Department Head calendars, 81

Disclosure of, 69

Documents containing exempt and
non-exempt information, 76

Exemptions

Attorney client communications, 75

Contracts, bids, requests for
proposals, 77

Deliberative process privilege, 77,
132

Documents relating to formulation
of negotiation strategy, 78

Drafts, 82

Federal laws, 74

Financial data, 76, 78, 79

Interest in non-disclosure vs. interest
in disclosure, 76

Law enforcement, 76

Litigation, pending, 75

Medical files, 74

Personnel files, 74

Requests for proposals, 77

State laws, 74

Sunshine Ordinance limitations on,
76

Maintaining and preserving, 80

Requests

Administrative appeal, 108

Assisting requesters, 69

Duty to produce records incrementally,
71

Fees

Copies, 73

Locating or inspecting records, 72

Other services, 72

Redacting, 72

Form for requesting documents, 135

Immediate disclosure requests, 129

Responding to requests, 69

Standard requests, 70

Timely response, 70

Sole source contracts, maintaining list of,
77

Public Records Act

General, 67, 68, 69, 73, 112

Penalties for violating, 107

Public Review File, 79

Public Trust

Public office duties, 19

Quorum, 16, 93

Recall of commissioners, 5

Records, retention and destruction

- Current, 83
- Permanent, 83
- Storage, 83
- Referrals, Prohibition on benefits for, 54**
- Removal of commissioners, 4**
- Reports**
 - Annual, 80
 - Closed session, 97
- Residency requirement, commissioners, 3**
- Resignation of commissioners, 5**
- Retreats, 87**
- Rules of order, 16**
- Secretary, commissions, role of, 12**
- Seriatim meeting, 86, 88**
- Social occasions, 87**
- Sole source contracts, Maintenance of list, 81**
- Sunshine Ordinance (SF Admin. Code Chapter 67), 112**
 - Exemptions
 - Deliberative process, 77
 - Limitations on, 76
- General, 112
- Penalties for violating, 108
- Private entities, provisions affecting, 112
- Task Force, 8, 32, 92, 108, 115, 122
- Training, 8
- Tape recording**
 - Closed session, 98
 - Public meetings, 105
- Term of office, commissioners, 3**
- Travel**
 - Constitutional ban on discount travel, 57
 - Giving a speech
 - in California, 56
 - outside California, 56
 - Government agency, paid for by, 56
 - Nonprofit organization, paid for by, 56
- Voting, commissions and boards, 17, 93**
- Web site**
 - Duty to maintain, 81
 - Reporting gifts on, 59

GOOD GOVERNMENT GUIDE

AN OVERVIEW OF THE LAWS GOVERNING
THE CONDUCT OF PUBLIC OFFICIALS

2005 EDITION



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